UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

BRISTOL MANOR HEALTH CARE CENTER

and

Case Nos: 22-CA-28153
22-CA-28349
22-CA-28549

SEIU 1199 NEW JERSEY HEALTH CARE UNION

Saulo Santiago, Esq. Newark, NJ,
for the General Counsel
David F. Jasinski, Esq. and Peter P. Perla, Esq. (Jasinski, P.C., Newark, New Jersey),
for the Respondent

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. This case stems from charges in Case Nos. 22-CA-28153, 22-CA-28349 and 22-CA-28549, filed on December 5, 2007, May 1, 2008 and September 12, 2008, respectively, by SEIU 1199 New Jersey Health Care Union (1199NJ or the Union) against Bristol Manor Health Care Center, (Bristol Manor, the Employer or Respondent). On November 25, 2008, the Regional Director for Region 22 issued an Order Consolidating Cases, Consolidated Third Amended Complaint and Notice of Hearing (the complaint) alleging that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. The complaint alleges, in essence, that Respondent unlawfully failed to and delayed in providing information to the Union; that it failed and refused to meet and bargain with the Union by unilaterally cancelling bargaining sessions and that it prematurely declared a bargaining impasse and unilaterally implemented terms and conditions of employment for employees represented by the Union. The Respondent filed an answer denying the material allegations of the complaint and raising certain affirmative defenses, as will be discussed, as relevant, in further detail below.[1]

On May 22, 2009, based upon an amended charge filed in Case No. 22-CA-28153, Counsel for the General Counsel issued a notice of motion to amend the complaint to further allege that Respondent unilaterally failed and refused to make contractually required pension fund contributions, and so moved at the inception of the hearing. [2] Respondent denied the material allegations of the amendment to the complaint and argued that they do not relate back to the original charge and are time-barred by Section 10(b) of the National Labor Relations Act.[3]

[1] Respondent's answer to the complaint was inadvertently omitted from the formal papers, although prior versions were included. There is no dispute that it was timely filed and is hereby incorporated into the record.

[2] At the hearing, I reserved ruling on the motion. As discussed below, General Counsel's motion to amend the complaint is hereby granted.

[3] In its answer to the complaint, Respondent asserts a Section 10(b) defense generally, "to

Continued

A hearing on this matter was held before me on May 26, 27 and 28 and September 1, 2, 15 and 30, 2009 in Newark, New Jersey. On the entire record, including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a New Jersey corporation with a facility located in Rochelle Park, New Jersey, is engaged in the operation of a nursing home and rehabilitation center. During the 12-month period preceding the issuance of the complaint, the Respondent derived gross revenues in excess of $100,000 and purchased goods valued in excess of $5,000 directly from points outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

As noted above, Respondent operates a long-term health care facility in Rochelle Park, New Jersey. It it one of several facilities operated by the Omni Management Corporation, (Omni), a company that manages a number of nursing homes in New Jersey including Castle Hill Health Care Center, Harborview Health Care Center and Palisade Nursing Center (hereafter Castle Hill, Harborview and Palisade).

The Union and Respondent have been parties to a series of successive collective-bargaining agreements covering a unit of full-time and regular part-time licensed practical nurses (LPNs) certified nurses aides (CNAs), dietary and housekeeping (Grade 1) employees and recreation employees.[5] There are approximately 120 employees in the unit. The most

---

the extent [the complaint] refers to or relies upon events and circumstances occurring beyond the limitations period. . .” Other than those allegations relating to Respondent’s alleged failure to make pension fund contributions, Respondent has failed to specify any other allegation of the complaint which it is contesting on this basis, and does not raise any such claims in its post-hearing brief. It is well settled that the party raising an affirmative defense bears the burden of proof. As Respondent has failed to specify those allegations of the complaint to which such an affirmative defense might apply, or to cite any evidence to support the general assertions contained in its answer, I conclude that it has failed to meet its burden of proof in this regard.

[4] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding as well as an assessment of the demeanor of the witnesses. In addition, the inherent probability of the testimony has been utilized to assess credibility. Where there is an apparent conflict in the evidence of particular relevance to my determinations herein, I have endeavored to explain the specific basis for my conclusions. Otherwise, testimony contrary to my findings below has been discredited on some occasions because it was in conflict with the credited testimony of others, otherwise incompatible with more reliable evidence or because it was inherently incredible or unworthy of belief.

[5] Respondent amended its answer at the hearing to admit the appropriate unit.

recent agreement between the parties was a memorandum of agreement which expired on July 24, 2007 (the 2002 MOA). The MOAs for Castle Hill, Harborview and Palisade expired on the same date as well, and the bargaining for these four facilities overlapped for some time. Although this proceeding relates to Bristol Manor only, from time to time the parties made reference to discussions at other tables, as will be described as is relevant to the issues herein.

The bargaining for a successor agreement commenced in June 2007 and continued with scheduled meetings to October 2007. There was a hiatus of seven months (allegedly as a result of Respondent's unlawful conduct) and one additional session was held in May 2008 prior to Respondents' declaration of impasse and issuance and implementation of its final offer. In August 2009 there was a three-day strike at the Omni facilities referenced herein. Thereafter, a subsequent negotiation took place on August 28, 2009. Respondent was represented throughout the 2007-2008 negotiations by its attorney David F. Jasinski, who was the lead negotiator, and consultant Mendy Gold.[6] With the exception of the last session, the Union was represented in bargaining primarily by executive vice-president Clauvice Saint Hilare, assisted by international representative Ron McCalla. There was also an employee bargaining committee which attended each scheduled session. In addition, in about August 2007, the Union asked for a federal mediator. Respondent agreed to this request, and James Kinney was appointed by the Federal Mediation and Conciliation Service to assist in the negotiations.

1. The KL Labor Group Agreement and Subsequent Memoranda of Ageeement

As a preliminary matter, it should be noted that at the outset of bargaining, neither party was in possession of a full contemporaneous executed copy of the collective-bargaining agreement which governed terms and conditions of employment at Bristol Manor or, in fact, any of the other Omni facilities. Both parties had a succession of MOAs and side letters but they had not been compiled into a uniform document.

The KL Labor Group Agreement (the KL Agreement) was a multi-employer agreement among several nursing home facilities and 1115 Nursing Home and Hospital Employees Union (Local 1115), predecessor to 1199NJ. This agreement ran from 1992 to 1996. During the course of negotiations, the parties disagreed as to whether this formed the underlying collective-bargaining agreement applicable to Bristol Manor. The Union took the position that it was. Saint Hilare testified that during the time he was assigned to this particular facility, he referred to this agreement during the course of adjusting grievances with the Union.[7]

Respondent has taken the position that the KL Agreement did not apply to Bristol Manor. The document in question does not specifically refer to this facility and, by its terms, does not reference a list of covered nursing homes.[8] In addition, as Respondent argues, during the course of negotiations the Union was unable to identify the constitutent members of the KL Labor Group nor identify who had signed the agreement on behalf of the parties. Respondent further argues that the Union did not raise the issue of the applicability of the KL Agreement until later in negotiations, after it became dissatisified with proposals put forward by the Employer.

---

[6] Gold did not testify herein.

[7] Saint Hilare was a representative at the facility for a short period of time in 2004 and again in 2006-2007.

[8] The exemplar of this agreement entered into the record, which was sent by the Employer to the Union in January 2008, contains the handwritten designation: "Master Agreement" and lists the following facilities: Bristol, Harbor View, Castle Hill and Whitehall 3. The record fails to address who may have made such a notation.

The General Counsel has taken the position in this proceeding, as the Union did in negotiations, the the KL Agreement is the underlying collective-bargaining agreeement covering Bristol Manor and that Respondent unreasonably refused to acknowledge this fact. Respondent, to the contrary, contends that the Union's continued insistence upon the applicability of the KL Agreement is evidence of the Union's bad faith in bargaining.

As noted above, the most recent collective-bargaining agreement between the parties was the 2002 MOA. As pertains to Bristol Manor, there are two versions of this document in evidence. One is unsigned and is dated as of an unspecified date in July 2002. Respondent maintains that this is the applicable MOA. The other version, which is signed is dated August 26, 2002. General Counsel contends that this is the most recent MOA. There are certain differences between these agreements, in particular regarding those provisions relating to pension and other benefit fund contributions. [9]

During the course of negotiations, in January 2008, the Employer provided its version of the 2002 MOA to the Union and there is no evidence that the Union objected to it at the time or at any time prior to Respondent's implementation of its final offer. I note that it does not appear from the record that the Union provided the Employer with a copy of its version of the agreement until the final meeting of the parties which took place on August 28, 2009. Under all the circumstances, however, I find it more likely that the latter version of this agreement, which is signed and dated, is the applicable 2002 MOA. [10] For purposes of the instant proceeding, however, notwithstanding their dispute over the KL Agreement, there is no evidence that the parties were in disagreement during the negotiations as to the terms and conditions of employment which were then applicable to Bristol Manor employees. To the contrary, the record

---

[9] For example, the version of the agreement relied upon by the Employer contains the following relevant provisions:

> The Union's present pension plan is to be converted to the SEIU Pension Plan effective August 1, 2002, for which the Employer shall pay monthly two (2%) percent of all covered employees' gross actual monthly wages which shall be defined as wages for hours physically worked, excluding overtime pay (other than for holiday pay on days worked where premium pay, if any, is paid), and excluding all benefit hour pay received by employees, including payments for uniform allowance and unused sick leave, all of which shall be excluded from the 2% gross monthly calculations for payment to the SEIU pension plan. One year's employment shall be a prerequisite to the Employer is making payment to the Pension Plan on behalf of any employee.

By contrast, the document which the Union contends is the most recent MOA contains the following language setting forth the Employer's obligation to remit benefit fund contributions:

> The Union's present pension plan is to be converted to the SEIU Pension Plan effective September 1, 2002, for which the Employer shall pay monthly, effective September 1, 2002 one and one half (1.5%) percent, effective September 1, 2004 one and one-seventh (1.7%) percent, and effective September 1, 2005 two (2%) percent of all covered employees' gross monthly wages. It is agreed and understood that all overtime pay and payments for uniform allowance and unused sick leave shall be excluded from all gross monthly calculations for payment to the SEIU pension plan. Further, one year's continuous employment shall be a prerequisite to any requirement of the Employer's having to make payment to the Pension Plan on behalf of any employee.

[10] As will be discussed below, Jasinski's testimony relating to post-implementation changes in terms and conditions of employment, tends to show that the Employer was following the pension fund contribution method as set forth in the signed and dated version of the agreement.

supports the conclusion that there was little, if any doubt on this issue and, as will be discussed below, the source of the parties' disagreements stemmed from the various efforts by the Union and the Employer to vary from these extant terms and conditions in a successor agreement.

2. The April and June Requests for Information, and Respondent's Replies Thereto

In anticipation of bargaining, on April 2, 2007, Saint Hilare wrote to Bristol Manor administrator Kristine Giles requesting certain information, as follows:

SEIU 1199 New Jersey Health Care Union requests the following information, which it needs for upcoming negotiations for a successor agreement. Please provide the information no later than May 15, 2007. At the same time, I would suggest May 22 or 24 as bargaining date.

1. Any and all documents, including but not limited to job descriptions and performance evaluations, that describe the job duties for all bargaining unit positions;

2. For each employee working in a bargaining unit position, such documents as will show the following:

- *a) Job title for each employee;*
- *b) Date of hire;*
- *c) Current hourly rate of pay;*
- *d) Regular hours of work;*
- *e) Number of overtime hours worked on a quarterly basis in 2006 and 2007;*
- *f) Address;*
- *g) Whether employee is a no-frills employee;*

3. Documents, including but not limited to summary plan descriptions that show all fringe benefits such as health insurance, disability, pension, profit sharing, and 401(k) benefits available to or provided to part-time and full-time employees in the bargaining unit;

4. Any and all manuals or other documents, including documents distributed to employees, that describe any of the terms and conditions of employment for employees in the -bargaining unit;

5. Gross annual payroll for the bargaining unit for the periods January 1, 2006 through December 31, 2006 and January 1, 2007 through March 31, 2007;

6. Total cost to the Employer for each of the following benefits provided to bargaining unit employees during the periods January 1, through December 31, 2006 and January 1 through March 31, 2007: health, dental, vision, life insurance and pension;

7. Number of employees covered by each of the following categories of health insurance: single, family, employee/spouse, employee/child;

8. Names of all agencies used by the Employer to provide temporary staff;

9. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and job title for each agency employee provided to the

Employer during the periods January 1, 2006 through March 31, 2007;.

10. Copies of work schedules for each nursing unit and/or department for the months October through December, 2006, and January through March 2007;

11. OSHA injury and illness records for 2005, 2006 and 2007.

12. Any and all documents setting forth policies regarding overtime work (both voluntary and mandatory), shift differentials and/or any form of premium pay for employees in the bargaining unit;

13. Any and all documents setting forth policies regarding health and safety in the workplace;

14. Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

Respondent, through Jasinski, initially responded to this information request on May 25, 2007. He enclosed a lit of employee names with addresses, job classifications, wage rates, dates of hire, job status, health insurance coverage and average hours for a two-week period. He additionally enclosed the employee handbook and a benefits rider which described the various benefits offered to employees.[11]

On June 4, Saint Hilare responded to Jasinski in relevant part, as follows:

The Union has made numerous unsuccessful attempts to scheule negotiations by phone and in writing. We have received part of the info requested for Palisade, Castle Hill and Bristol Manor. The Union is available for bargaining on June 14, 19, 20 and 21, 2007. The Union suggests we start with Castle Hill. Please advise regarding your availability. The Union has no problem bargaining at the facility or at the Union's office.

* * *

For the record, I just want you to know that the package you sent to the Union contains for Bristol Manor: Employee list with rate, social security number, date of hire and a policy manual; for Castle Hill only a cover letter and a policy book; for Palisades: Employee list with rate, social security number, date of hire and a policy manual. In order to prepare for negotiations, the Union requests the following information:

- *An updated list of all employees performing bargaining unit work by job classification in seniority order, including name, address, social security number, job title, date of hire, wage rate, shift, enrollment in health insurance (and at what level of coverage, individual, dependent, or family), part-time or full-time status, number of hours worked and paid since January 1 2007, and amount of vacation days, sick days, personal days and/or holidays earned but unused for the employees at Castle Hill. We did not receive any of this information in the package that you sent to the Union for Castle Hill.*

- *The gross bargaining unit payroll from January 1 2007 through June 30 2007 for*

[11] Single health insurance coverage was provided at no cost to the employees. The benefits rider listed the additional costs to employees if they wished to include family members under the Employer's plan.

Palisades, Bristol Manor and Castle Hill.

Jasinski testified that, at the outset of negotiations, Saint Hilare had stated that it was his intention to negotiate the Castle Hill contract first and the others would then fall into place and, further, relies upon the above letter to support these contentions. Saint Hilare denied this was the case, and on cross-examination General Counsel elicited testimony from Jasinski that that the Employer and the Union met for Bristol Manor on three occasions prior to the first bargaining session for Castle Hill, which took place on July 25, 2007.

On June 4, Jasinski forwarded a copy of Respondent's summary description plan for its health insurance, which listed the various benefits offered to employees and set forth the costs to employees for family health insurance and dental coverage.

B. The Bargaining and Information Requests

1. The First Bargaining Session – June 20, 2007

The first meeting between the parties took place at Union headquarters on June 20, 2007. Attending were Jasinski and Gold, Saint Hilare, Union official Marvin Hamilton,[12] and an employee bargaining committee. Saint Hilare opened the meeting by setting forth the Union's goals for bargaining: better health insurance coverage and pension benefits; decent and fair wages that value the work of employees and improvements in the language of the contract that would strengthen the Union at the shop and encourage a better relationship with management.

According to Jasinski, the Union stated that their intention was to obtain an agreement which mirrored the so-called "Tuchman Agreement," a multi-employer collective-bargaining agreement negotiated by the Union with various other nursing homes and rehabilitation facilities in New Jersey [13] and that the Union wanted the Employer to participate in the Union's benefit plan – the Greater New York Benefit Fund (GNYBF)-- which provided for employer-paid dependent coverage. The Employer replied that it wanted to negotiate a contract for Bristol Manor that addressed the unique needs of the facility, its employees and its residents.

At this meeting, the Union put forward a full contract proposal containing both economic and non-economic terms. The Union sought a three-year agreement with various modifications including, among other things, a reduction in the probationary period from 60 to 30 days, an increase in paid time off for employees, the Employer's participation in the GNYBF or another plan equal to or better than the Union's plan (including dependent coverage) with the cost of premiums to be covered exclusvely by the employer, the addition of parental and marriage leave and a health and safety clause which provided for a "zero lift" policy as well as the establishment of a health and safety committee. With regard to wages, the Union proposed a seven percent across-the-board raise for each of the three years of the agreement with minimum hourly salaries effective as of July 2009 of $11.00 for CNAs and $10.00 for Grade 1

[12] McCalla did not attend this meeting.

[13] Jasinski's bargaining notes indicate that rather than referring specifically to the "Tuchman Agreement," the Union indicated that it wanted to "establish a state-wide contract." There are two versions of these notes in evidence, one which Jasinski claimed to have been an "extension or expansion" of an earlier document. Accordingly, I find that it is the earlier document which represents the notes which Jasinski took contemporaneously with negotiations. In any event, both versions of his notes contain the reference noted above, and I find that these notes reflect what Saint Hilare told the Employer on this occasion.

(dietary and housekeeping) employees.[14] The proposal further provided that the employer would make contributions to the Union pension fund of three percent of gross payroll for each non-probationary employee covered by the agreement.

Jasinski commented that the wage increases sought by the Union, coupled with the proposed increase in minimum salaries, would in some cases amount to a 30 percent increase during the contract term, far outside what is customary in the industry, where 2 ½ percent to 3 percent is a common wage increase. Jasinski also made clear that the Employer had no interest in participating in the GNYBF, that for years the Employer had maintained its own health plan, that the Union had previously negotiated this arrangement and that it had worked for both parties until now. Jasinski also commented tht the GNYBF plan was in financial difficulty and that it had been obliged to change benefits and increase the level of employer contributions. The Union stated that Jasinski's comments were derogatory, and he replied that this was just a fact.

Saint Hilare brought up the subject of the items still outstanding from the Union's prior information requests. Jasinski asked for a copy of the letter which had been sent to Giles. He also stated that some of the information sought was irrelevant to the process, and he did not think the Union needed it to bargain. Saint Hilare replied that Jasinski had been bargaining with the Union for years, so he knew the type of information it sought. According to Saint Hilare, Jasinski stated that he would provide additional information prior to the next session. [15]

The parties discussed extending the collective-bargaining agreement while negotiations were in progress and there was a mutual acknowledgment that the respective contract files were incomplete. The parties began reviewing the Union's proposal, but ended the session before the review was complete. Another meeting was scheduled for July 13.

2. Respondent Provides Additional Information to the Union

On June 21, Respondent provided additional information to the Union including the the gross wages for January through December 2006 and January through March 2007 and aggregate figures for the costs of health, dental preminum and life insurance premiums for the same periods of time. McCalla testified that, based upon the figures provided by the Employer he was able to determine that the employer was paying approxmately 20 percent of gross wages in health insurance costs, whereas the percentage of employer contributions under the GNYBF were higher, ranging betweeen 22 1/3 percent to 23 ½ percent.

3. Second Bargaining Session – July 13, 2007

This meeting generally concerned itself with issues raised by the Union's information request. The Union maintained that it had received some, but not all of the information it sought. Jasinski stated that the Union would receive additional information, but it had what was required

[14] Although the Tuchman Agreement had contract minimums of $11 and $10 for CNAs and Grade 1 employees, respectively, the term of that agreement was from 2005 to 2009 and it is not apparent from the record when such minimum salaries took effect.

[15] Counsel for the General Counsel asked Saint Hilare if he explained to Jasinski why the Union needed the information it sought. Saint Hilare responded, "Yes, we explained that to him also." However, Saint Hilare offered no specific testimony regarding what he may have told Respondent regarding any specific item sought. I find therefore, that Saint Hilare did not make clear on this occasion why the information sought by the Union was relevant to negotiations.

to bargain the contract.

The Union mentioned that it had heard from its members that certain LPNs were agency employees, and asked for information about such agency usage. According to Saint Hilare, the Employer responded that they were unsure whether agency employees were being used at Bristol Manor, and would check on the issue. Jasinski testified that, in response to the Union's claim that agency employees were being used, the Employer asked for specifics, which the Union never provided. Jasinski further testified that this issue came up in virtually every bargaining session where Union was told that no agency employees were being used, but refused to believe the Employer's assertions on this issue.

The Union also asked for information regarding "no-frills" employees.[16] According to Saint Hilare, there was no in-depth discussion of the issue at the time. The Union asked the Employer for the names of no-frills employees, and Gold replied that the information which had been provided to the Union spoke for itself. Saint Hilare made reference to the employee roster which had previously been given to the Union. There were a number of employees listed who did not appear to have health insurance, although they had the tenure and worked sufficient hours to qualify. [17] Gold asked the Union to indicate these individuals on the list and he would look into the issue. Saint Hilare then noted the names of all employees who appeared to qualify for coverage, but were not listed as having any and gave the list to Gold, who stated that he would provide an answer to the Union at or prior to the next session. According to Saint Hilare, Gold never responded to the Union's inquiries about specific employees.

According to Jasinski, the Employer told the Union that the facility did not have any no-frills employees and that the Union did not believe the Employer's contentions in this regard. Jasinski stated that the Employer asked for individual names of employees suspected of being no-frills employees, but the Union never came forward with such information. As Jasinski testified, because the Union could not provide specifics, the Employer was unable to follow up on the Union's allegations.

During the meeting, the Union asked a series of questions regarding the Employer's health insurance plan. In response to an inquiry as to whether the Employer was self-insured, the Union was told that it was not. The Union wanted to begin a discussion of dependent coverage and asked the Employer to identify the possible universe of who might need such insurance – that is how many of its current employees were married or had families who might benefit from such coverge. Jasinski stated that the Employer would not do that, and Gold threatened to leave the meeting if the Union persisted in discussing this topic. The Union asked the Employer to provide information about out-of-pocket expenses for employees under its health plan, and Jasinski stated that he would provide such information. The Union also raised the issue of dental coverage. Under the contract the Employer was obliged to assume the entire costs of such coverage, but employees had claimed that contributions were being taken out of their pay. Jasinski agreed to look into that issue as well.

According to Jasinski, the Union spent much of its time griping rather than negotiating, raising issues such as employee non-participation in the health plan and the issue of dental

[16] No-frills employees are those who have agreed to forego certain contractual fringe benefits for an enhanced wage rate. Under the 2002 MOA, the Employer was limited to offering such terms to 10 employees.

[17] Under the 2002 MOA, employees become eligible for single coverage after working more than 20 hours per week for a period of 6 months.

insurance. Jasinski testified that he told the Union that this was time not productively spent on negotiations and a better practice would be to address such matters at meetings between the Union and management, but that the Union persisted in raising these and similar gripes at just about every session.

4. The Union's July 17, 2007 Request for Information and Extension of the Collective-Bargaining Agreement

On July 17, 2007, Saint Hilare wrote to facility administrator Giles, largely reiterating prior requests dated April 2 and June 4, requesting information peviously sought regarding overtime, regular hours of work, agency usage, the names of no-frills employees, work schedules, OSHA reports and Medicaid cost reports. In addition, Saint Hilare requested:

> *Number of employees covered by each of the following categories of health insurance: single, family, employee/spouse, employee/child. Additional[ly] the Union requests all information the employer holds concerning family status of each employee in the catefores referenced above whether or not the employee has opted to include family members for health insurance purposes. Family status information was requested during the July 13, 2007 bargaining meeting.*

On July 18, Jasinski wrote to Saint Hilare enclosing a corrected employee list. As before, according to Saint Hilare, this list contained a number of apparently eligible employees who were listed as not having health insurance coverage.

Saint Hilare had previously sent Jasinski a proposed contract extension agreement. Subsequently, by letter of July 23, Jasinski signed a revised extension agreement by which the Employer agreed to extend the contract to September 7. The extension agreement further provided that all changes to the collective-bargaining agreement become effective upon the approval and ratification of the new agreement by all parties.

5. The Third Bargaining Session –July 23, 2007

At this bargaining session, certain features of the Union's initial proposal were discussed, in particular the duration of the contract, the probationary period, the addition of sexual orientation to the anti-discrimination language of the agreement, the union visitation clause and the formation and scope of a labor-management health and safety committee. According to Jasinski, there was no discussion of economics and the parties focused their discussion on terms and conditions of employment. As Jasinski testified, he had informed the Union that he preferred to resolve so-called "language' issues first before addressing economics.

The Union also asked for a complete response to its information request, with an emphasis on identifying the no-frills employees. The employee roster provided to the Union showed 21 employees without health insurance, as listed, and the Union wanted an explanation about this apparent inconsistency with the Employer's assertion that there were no no-frills employees. Jasinski said the roster spoke for itself, but Gold agreed to look into the issue. The Union additionally asked for a summary plan description of the Employer's life-insurance plan. The Employer asked for information about the Union benefit plans, and Saint Hilare stated that he would provide such information to the Employer.

There was a discussion about the tone at the bargaining table. Jasinski stated that the parties needed a better way of approaching one another. The Union raised the issue of Gold's

threat to leave during the prior session, and claimed that Employer representatives made disparaging comments to the Union. Jasinski advised the Union that the Employer wanted to conclude the contract and that nothing personal was meant.

The Union also stated that it was seeking a proposal from the Employer, and Jasinski committed to preparing one for the next meeting.

The parties subsequently scheduled a meeting for some time in August, but it did not take place.

6. The "Compilation Agreement"

The parties had mutually acknowledged the fact that the disarray in their contract files coupled with the lack of an integrated contemporaneous collective-bargaining agreement presented an obstacle to negotiations. In a bargaining session which had been held at Harborview on June 19, the Employer had agreed to prepare a document representing existing terms and conditions of employment for the various Omni facilities.[18]

On July 27, Jasinski sent an agreement, which is referred to in this record as the "compilation agreement," to the Union along with the following cover letter:

> *Enclosed please find a copy of the Agreement we compiled. This document was particularly difficult since the agreements were old or missing. We took the liberty to represent the understandings and practices of the parties.*

When Saint Hilare and McCalla reviewed the document they found that it did not accurately represent existing terms and conditions of employment. For example, the probationary period had been extended from 60 to 90 days; there were increased restrictions on Union access to the facility; the agreed-upon process which would enable the Union to organize new departments without an election had been eliminated; the provision providing for daily overtime had been deleted; the allowable number of no-frills slots had been increased from 10 to 20 and the threshold of hours required to qualify an employee for paid time off and health insurance had been increased. Although Jasinski testified that he had made the Union aware that the compilation agreement would contain not only existing terms, but would seek to incorporate certain of Respondent's contract proposals, this is not referenced in his cover letter or in the compilation agreement itself, and it appears that Jasinski did not acknowledge this fact until the Union brought the matter up in subsequent negotiations.[19]

7. Additional Information is Sent to the Union

On July 30, 2007, Respondent sent the Union an updated list of employee names, addresses, job classifications, wage rates, dates of hire, job status, health insurance status and

[18] According to Jasinski, the Union requested that he prepare the document, and he told them that he would "look to draft a comprehensive agreement which represented the contract from the Employer's perspective." According to McCalla and Saint Hilare, the Union had initially requested copies of all underlying contracts and MOA's in Respondent's possession, and in response Jasinski offered to prepare a document which memorialized the existing terms and conditions.

[19] The compilation agreement also provided for the following hourly minimum salary rages effective July 26, 2007: LPNs -$16.50, CNAs - $8.00, Recreation - $7.60 and Grade 1 - $7.00.

average hours for a two-week period during the prior six months. In this letter, Jasinski asserted that the Respondent had fully complied with the Union's information requests.

8. The Union's Response to Respondent's July 30 Submission

On August 8, 2007, Saint Hilare sent a letter to Respondent suggesting bargaining dates for the Omni facilities during the month of August. The letter advises the Employer that the Union had contacted the New Jersey State Board of Mediation to secure a mediator and further notes that the Union had not received a management proposal at any of the Omni tables and requested that management put forward proposals at the next bargaining session for each of the facilities. In this letter, Saint Hilare further asserts:

> *We are in receipt of your Bristol Manor document compiling the various memorandums of agreement into one document. Needless to say we have many questions concerning this document. You agreed to supply a similar compilation document for each of the other Omni facilities and to supply copies of the MOAs that you used to produce each compilation document. Please inform us of the date you expect to complete this work.*

9. The Fourth Bargaining Session—October 2, 2007

This session was attended by Jasinski, Gold, Saint Hilare, McCalla, the bargaining committee and the federal mediator. The Union advised the Employer that the proffered compilation agreement was not what it purported to be and asked what Jasinski had used to compile the document. Jasinski replied that the Employer had taken the liberty of inserting the Employer's proposals into the document and that the minor changes they reflected should not pose a problem for the Union. He additionally stated that an agreement that the Union had negotiated with another non-Omni facility, referred to in the record as St. Lawrence, had formed the basis for some of the language in the compilation agreement.

Based upon discussions at other bargaining tables, Jasinski had highlighted the Employer's proposals, and the parties reviewed them. The discussion became, as McCalla characterized it, "pointed" at times. Jasinski stated that if the Union disagreed with the Employer's proposals, it should submit counter-proposals. According to Jasinski, the Union flatly rejected the Employer's proposals with regard to overtime, health insurance and the percentage of Employer contributions to the Union's pension fund. [20]

Saint Hilare asked the Employer to consider the KL Agreement as the underlying collective-bargaining agreement and the foundation for continued bargaining. Jasinski stated that he did not consider the KL Agreement to be relevant to the process. The Union asked Jasinski to conduct further research into the issue.

The Union requested that the Employer put forward an economic proposal. Jasinski

[20] The Employer had additionally proposed a change in the method by which pension contributions would be calculated. The Employer had proposed contributions of two percent for full-time employees only for "hours physically worked." Although such language had been in the unsigned version of the 2002 MOA, it was at variance from what was generally understood to be the Employer's current obligations under the 2002 MOA, which provided for contributions for both full-time and part-time employees as a percentage of gross payroll with certain enumerated exclusions. This alteration in the formula, as set forth in the compilation agreement, had not been highlighted and the parties did not discuss it at the time.

stated that his preferred methodology was to finalize non-economic terms first; however, he agreed to do so at the next session.

The parties additionally agreed to a further contract extension, to October 15, 2007. In addition, Saint Hilare requested that the Employer comply fully with the Union's various requests for information.

10. The October 19, 2007 Request for Information

On October 19, 2007, Saint Hilare wrote to Jasinski requesting information which had previously been requested, but which the Union felt had not been provided. In addition, the letter reflects certain requests that had been made directly at the bargaining table. As Saint Hilare wrote:

Dear Mr. Jasinski,

The Union has made several unsuccessful efforts to obtain from these employers information necessary to bargain contracts at Castle Hill, Palisades, Harbor View and Bristol Manor. The failure by these employers to produce requested documents has hampered our bargaining especially as we are finally beginning economic bargaining. The Union repeats its request for the following information for each of the four above referenced facilities:

1. For each employee working in a bargaining unit position such documents as will show the following:
a) Regular hours of work.
b) Number of overtime hours worked on a quarterly basis in 2006 and 2007.
c) Whether an employee is a no-frills employee.

2. Names of all agencies used by the Employer to provide temporary staff.

3. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and the job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007.

4. Copies of work schedules for each nursing unit and/or department for the months October through December 2006, and January through March 2007.

5. OSHA injury and illness records for 2005, 2006, and 2007.

6. Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

7. The per-employee monthly premium cost for Employer funded single health insurance coverage (requested verbally during bargaining).

8. Copies of all collective bargaining agreements and memorandums of understanding/agreements including all documents that you used to compile the documents that were submitted across the table and characterized by you as the current contract at each of the above referenced facilities.

With respect to this last item, because the current Union and management negotiators did not participate in the negotiations of the prior contracts with these employers, we are both at a disadvantage in compiling a full set of contracts and MOAs for each facility. The documents that you handed us in bargaining that purportedly summarized the current terms and conditions of employment from prior agreements, were inaccurate. We therefore, reiterate our request for all contracts and MOAs between the parties since 1990 that are within the possession and control of your clients.

General Counsel adduced testimony from both McCalla and Saint Hilare about why such information had been requested.[21] In particular, the Union representatives testified that the Union sought information regarding regular work hours and overtime information because employees had complained that staffing was not sufficient and because the Employer had proposed eliminating daily overtime – a proposal which would impact unit employees. The number of no-frills employees related to bargaining over the issue of dependent health care coverage. Both McCalla and Saint Hilare testified that the employee rosters raised questions regarding the Employer's use of the no-frills classification since the list indicated that more than 10 employees (the allotted number of no-frills slots) who were eligible for health insurance did not receive such insurance or extra compensation for foregoing such benefits.

The second and third paragraphs requested information regarding the use of agencies to provide employees to perform bargaining unit work. Saint Hilare testified that the Union had received anecdotal evidence from employees that agency employees had been used. McCalla testified that information regarding agency usage is relevant because agency employees are costly to the employer and the Union might want to consider whether some of the money spent on temporary staff might well be utliized to enhance the benefits of current employees; the Union was considering a staffing proposal and that the use of agency employees erodes the bargaining unit. OSHA records were requested to track whether there were safety issues at the facility which should be addressed and to defend the Union's health and safety proposals.

According to McCalla, the Medicaid cost reports were something "typically" gotten before bargaining to give the Union a "snapshot" of the facility. Such reports, which are filed with the state, are voluminous and contain information about facility such as the census, number of beds, officers, staffing and agency usage, among other items. McCalla testified that these reports were reviewed by the Union's research staff, and not by him personally. Nor did he identify where information regarding staffing or agency usage would be found.

The Union also requested per-employee premium cost for Employer-funded single health insurance. Although the Employer had previously provided information relating to the costs of dependent coverage, it had not provided the Union with specific information about the costs of single employee coverage. McCalla and Saint Hilare testified that this information was necessary to enable it to calculate the total cost for health insurance. In addition, the Union

[21] Over Respondent's objection, General Counsel proffered, and I accepted into the record, testimony given by McCalla in another proceeding involving Castle Hill Nursing Home which goes to this issue. I note that Respondent was afforded a full opportunity on this record to cross-examine General Counsel's witnesses regarding their testimony in the prior proceeding. I further note that I do not rely upon this general testimony to establish what was actually stated during meetings or in other communications between the parties about the information sought and its possible or probable relevance. For that, I rely upon specific testimony about particular bargaining sessions, correspondence and, where appropriate, the bargaining notes taken by McCalla and Saint Hilare.

again requested copies of those documents which the Employer had used when preparing the compilation agreement.

11. Evidence Regarding the Employer's Use of Agency Employees

Saint Hilare testified that he advised the Employer that the Union had heard that the Employer was using agency LPNs. He further testified however, that any knowledge he had of this issue came from Union delegates or employees. On cross-examination, Saint Hilare acknowledged that although he visited the facility regularly he did not speak to any agency employees during his visits. McCalla testified that he had not seen any documents which would lead him to believe that there was agency usage at Bristol Manor; nor had he spoken about this issue with any employees other than those on the bargaining committee. In addition, McCalla initially could not recall if he heard anecdotal evidence of agency usage directly from the members of the bargaining committee or through Saint Hilare. He then acknowledged that his knowledge stemmed from what Saint Hilare had told him.

As noted above, Jasinski testified that he told the Union that the Employer did not use agency employees, and that if the Union had contrary information they should provide specific examples. General Counsel points to the fact that Jasinski acknowledged that the Employer had used temporary employees during a three-day strike which occurred subsequently, in August 2009, and argues that the following testimony suggests that that agency employees had been used during the period when the parties were actively bargaining:

> Q: [by General Counsel]: Mr. Jasinski, are you aware of a temporary agency called Tri-State Account Services?
> A: During the three-day strike I heard of the name Tri-State Services for the first time.
> [questions asked for purposes of clarification by the administrative law judge omitted]
> Q: do you know if Bristol has used Tri-State prior to August 2009?
> A: I don't.
> Q: Is it possible that they could have used Tri-State prior to 2009?
> A: I guess it's possible, I just don't know.
> Q: Do you know if the employees at the bargaining table were telling you there were agency employees from Tri-State Health Services?
> A: At Bristol they might have made a reference to that. I take that back, I don't know if they made reference to Tri-State. I think they –I think at Bristol they might have made reference to the [fact] that there might have been Agency usage at the facility, but again, there was never any specifics or any – but in terms of an actual name, I don't recall ever hearing the name Tri-State before the work stoppage.

There is no further evidence regarding the Employer's use of Tri-State, or any other agency, or whether Tri-State supplied services to Respondent relating to work ordinarily performed by bargaining unit employees.

12. The Fifth Bargaining Session – October 25, 2007

During this meeting, Saint Hilare brought forward the Union's modification of the non-economic terms of its initial proposal which had been altered as a result of discussions the parties had held at prior bargaining sessions. Saint Hilare went through the new proposal and pointed out that in some instances the Union had adopted the Employer's stated position in its entirety and in others had altered its language to more closely approach the Employer's position. The Union had made modifications to its proposals regarding the probationary period, union activities and communications, discipline and discharge, transfers and promotions,

seniority, layoff and recall and health and safety.[22] The Union's proposal states that it is conditioned upon the withdrawal of management's prior proposals (as had been set forth in the compilation agreement) regarding the bargaining unit, the probationary period and union visitation. Jasinski stated that in his opinion such a contingent proposal constituted bad-faith bargaining. The Union responded that it did not consider such a proposal to be in bad faith, that they were trying to come closer to the Employer's position in a number of areas and that it was not unheard of to ask an employer to make concessions in exchange for a more favorable proposal.

The Employer put forward contract proposal which contained economic provisions including a contract term of five years with an overall wage increase of 17.25 percent. At the expiration of the agreement, the minimums for CNAs and Grade 1 employees would be $8.50 and $8.00, respectively. Also proposed was an increase in life insurance coverage from $12,000 to $15,000. The Employer's proposal also reiterated the terms which had been set forth in the compilation agreement including a pension proposal providing for monthly contributions of two percent for all eligible full-time employees' gross actual monthly wages, defined as hours physically worked, excluding paid leave. Employees would become eligible for particpation in the pension plan after one year's employment. The Employer also proposed increasing the number of no-frills slots to 20. According to McCalla, the Employer's proposal was presented toward the end of the meeting and the remainder of the time was spent getting clarity on the timing of the wage increases and minimums, which did not always coincide with the anniversary date of employment, but were tied to the anniversary or six-month date of the contract.

13. Respondent Cancels a Meeting Scheduled for November 5, 2007

After the parties met on October 25, Saint Hilare contacted Jasinski about further bargaining for Bristol Manor, and a meeting was scheduled for November 5, 2007. Three days prior to this session, Jasinski contacted Saint Hilare and stated that due to illness he was cancelling the meeting. It does not appear from the record that Jasinski made any attempt to reschedule this bargaining session. Nor is there evidence that the Union requested additional bargaining dates at the time.

14. Saint Hilare's November 9, 2007 Letter Regarding the Union's Information Request

On November 9, Saint Hilare sent the following letter to Jasinski:

The Union has made several unsucessful efforts to obtain from these employers information necessary to bargain contracts at Castle Hill, Palisades, Harbor View and Bristol Manor. The failure by these employers to produce requested documents has hampered our bargaining especially as we have finally begun economic bargaining.

I sent another request for this previously requested information to you on October 17, 2007. We have not received a respons. Please reference Our October 17, 2007 letter and supply the requested items. It is [in] the interests of both parties to conclude bargaining at the above referenced facilities as soon as possible. We would appreciate receiving the information before our next bargaining session for the above referenced facilties or by Wednesday, November 14, 2007 if we have not scheduled bargaining

[22] No changes were made to the Union's economic proposals.

dates before then.[23]

15. The Employer Proposes a Christmas Bonus and the Union Agrees

On December 12 and 13, 2007 the Employer wrote to the Union proposing a one-time holiday bonus for all full-time and part-time employees of $150 and $75 respectively. The Union voiced no objection to this, and eventually communicated its agreement with the proposal. The bonus was implemented prior to the Christmas holiday.

16. On January 29, 2008, Respondent Replies to the Union's October 19, 2007 Information Request

By letter dated January 29, 2008, Jasinski issued the following response to the Union's October 19, 2007 demand for information. Copies of various memoranda of agreement, including the unsigned version of the 2002 MOA and the KL Agreement were enclosed as well.

As Jasinski wrote:

We are frustrated with the Union's current efforts to avoid meaningful contract negotiations. At the request of the Union, and in an effort to move the negotiations forward, we submitted a complete contract which set forth its understanding of the existing terms and conditions, as well as some limited modifications which we highlighted. Instead of showing your appreciation, the Union decided to file unfair labor practice charges alleging that I somehow misrepresented the terms of the prior contract. As you know, these allegations are patently false.

Early in these negotiations, the Employer provided the Union with all of the documents responsive to its information requests. Nonetheless, the Union did what it always does -- ask for additional information that is largely duplicative and/or irrelevant to the bargaining process. Your recent request for information further represents the Union's delay and bad faith tactics.

Nonetheless, in a further effort to move the negotiations forward, we respond to your additional request for information, dated October 19, 2007, as follows.

Request No. 1

For each employee working in a bargaining unit position such documents as will show the following:

- *a) Regular hours of work;*
- *b) Number of overtime hours worked on a quarterly basis in 2006 and 2007; and*
- *c) Whether an employee is a no-frills employee.*

Response to No. 1:

This information was already provided to the Union.

[23] It appears that the references to Saint Hilare's October 17 letter are in error, and that he was, in fact, referring to his October 19 letter and information request.

Request No. 2

Names of all agencies used by the Employer to provide temporary staff.

Response to No.2
The facility does not utilize any agencies to provide temporary staff.

Request No. 3

Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and the job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007.

Response to No. 3

The facility does not possess any such invoices.

Request No. 4

Copies of work schedules for each nursing unit and/or department for the months October through December 2006, and January through March 2007.

Response to No. 4

This information will be forwarded to the Union under a separate cover.

Request No. 5

OSHA injury and illness records for 2005, 2006, and 2007.

Response to No. 5

The facility does not possess such information. Furthermore, we fail to see how this information is relevant to the current negotiations.

Request No. 6

Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

Response to No. 6

This information is readily available to the Union through the State. Indeed, as the Union has demonstrated in the past, you are already in possession of this information

Request No. 7

The per-employee monthly premium cost for Employer funded single health insurance coverage (requested verbally during bargaining).

Response to No. 7

This information was already provided to the Union.

Request No. 8

Copies of all collective bargaining agreements and memorandums of understanding/agreements including all documents that you used to compile the documents that were submitted across the table and characterized by you as the current contract at each of the above referenced facilities.

Response to No. 8

We find it particularly troublesome that you seek copies of prior contracts and MOAs negotiated by your Union. Nonetheless, we enclose the prior contracts and all memoranda of agreements in our possession and the documents provided by the Union during the negotiations, including the KL New Jersey labor Group Contract.

* * *

Jasinski continued:

We look forward to continuing our contract negotiations and fully anticipate that the Union will resume these negotiations in good faith. All we ever wanted was to negotiate a fair contract that balances the needs of the facility, our employees, and our residents. As you have demonstrated, you have been able to negotiate and make proposals. Avoid the game-playing that has scarred other negotiations. We are not interested in game-playing and only look for a contract that addresses the needs of our employees.

17. Saint Hilare's February 14, 2008 Response to Respondent's January 29 letter

On February 14, 2008, Saint Hilare responded to the letter sent by Jasinski on Janaury 29 and the information provided therein, as follows:

I am responding to the letters you faxed to the Union on January 29, 2008 referencing a request for information relevant to negotiating collective bargaining agreements at the above referenced facilities that I sent you on October 19, 2008. While you sent four separate letters for each of the facilities in question, your statements were identical in each letter so I will take the liberty to respond to all of the assertions you raised in one document.

The Union shares your frustration at the lack of progress at these negotiations though we take issue with many of the assertions in your letters. To start, the "complete contract" you submitted at each negotiation was not a faithful representation of the existing terms between the parties and you did not indicate or state that it included "highlighted modifications" when you provided the document. The changes you inserted were subsequently highlighted only after we brought them to your attention at bargaining. Further, you did not provide "all the documents responsive to ... information requests". We have raised the issue of lack of compliance with our information requests both in writing and at multiple bargaining sessions for the above referenced facilities. I will respond to your letter in the format you used. Each response represents our understanding for each of the above referenced facilities.

Request 1

1. We have not received information on overtime hours.
2. We have not received a list of no-frills employees. Contrary to your claims, we cannot determine from information provided which employees are no-frills.

Request 2 and 3

Information from our members disputes the assertion that no agency CNAs are being used in the above referenced facilities.

Request 4

As I advised you on February 7, 2007 we have yet to receive the copies of work schedules for the above referenced facilities promised in your January 29, 2008 letter.

Request 5

We find it hard to believe that the facilities do not keep OSHA logs. It is my understanding that nursing homes need to keep these records. The Union has made proposals for improved health and safety standards that would be informed by this information which reflects employee injuries and illnesses.

Request 6

We understand but do not agree with your position that you need not provide Medicaid costs reports and other related data because this information is available from other sources. Kindly furnish the 2007 report as soon as it is available.

Request 7

You provided only the cumulative cost for single health insurance coverage for everyone in the above referenced facilities, not the monthly per employee premium cost to each of the four employers. That vital piece of information cannot be accurately computed from the information we received. We cannot simply divide the cumulative total by the number of employees to determine the cost because the number of employees fluctuates from month to month. We do not understand why you refuse to simply provide this readily accessible monthly premium information.

Request 8

We finally received the MOAs and contracts as you promised in your January 29, 2008 letter. We are pleased to receive this information so that we can confirm past practices and benefits and bargain intelligently over the issues. We note that at least one of the KL Labor Group contracts you sent us is not a document we had and gave to you during bargaining. We presume that it is a document that the employer had in its possession and recognized as part of the bargaining history between the parties. If that is incorrect, please let me know.

The Union also looks forward to returning to negotiations and concluding collective bargaining agreements that address the legitimate needs of our members as well as the

needs of the residents and operators of the facilities.

18. Respondent Replies to Saint Hilare's February 14, 2008 Letter

On February 20, 2008, Jasinski responded to the assertions contained in Saint Hilare's letter, as set forth below:

We have reviewed your letter dated February 14, 2008 combining all facilities and continue to be perplexed by your actions. Instead of focusing your attention on negotiating a contract in the best interests of your members, you persist with your requests for information entirely irrelevant to the bargaining process.

As we advised you, we will provide copies of the work schedules under separate cover. Otherwise, we have fully complied with the Act by providing the Union with all the information necessary to negotiate. We continue to assert that this information is unnecessary, irrelevant and already in the Union's possession. Your request for irrelevant information further represents the Union's delay tactics and abuse of the process. One needs to look no further than the Union's ability to put forth full comprehensive economic offers with the information we have already provided to you.

Additionally, we have repeatedly told you at the bargaining table that the KL Labor Group contracts have no relevance to these negotiations. Contrary to your self-serving statements, we do not recognize that these documents are part of the bargaining history of the parties.

It is time for you to stop playing games and focus on negotiating a contract in good faith. If it is your position that the Union will not return to the bargaining table without this information, please let us know. If that is the case, we respectfully request that you have the decency to inform your members of the reasons that the parties are not meeting. We do not want any misunderstanding or miscommunications on this point. Otherwise, we intend on going forward with the scheduled sessions in a good faith effort to reach an amicable resolution that balances the needs of this facility with that of the employees.

Finally, by combining all the facilities in your letter, you continue to disregard our position that each facility is separate and stand alone. In the future, please address each facility separately, since each facility has its own collective bargaining agreement.

19. The Scheduling and Cancellation of Bargaining Sessions and Related Correspondence

As Saint Hilare testified, the parties had scheduled a bargaining session for February 20, 2008. Jasinski cancelled this session, citing the unavailability of the mediator. Jasinski acknowledged that the Union had made it clear that it was willing to meet regardless of whether the mediator was present, confirmed that he had refused to meet without the mediator in attendance and offered the following testimony:

Q: [by Respondent counsel]: Did you have any concerns about meeting without the mediator present?

A: I did

Q: Why is that?

A: Because the mediator was brought into the negotiations and its been my practice and a history that I – once a mediator is brought in I am deferential to the mediator to act as the moderator of contract negotiations and I've followed that since I've been starting [sic] practice in the late 70s.

On February 22, 2008, Saint Hilare sent the following letter to Jasinski:

I am writing to follow-up on our conversation last week regarding Bristol Manor in which you cancelled our bargaining session scheduled for February 20, 2008 because the mediator was not available.

Although the Union has no objection to the mediator's presence at bargaining, we strongly object to your cancellation of the scheduled bargaining session simply because the mediator could not attend. I remind you that the two parties have not met for Bristol Manor bargaining since October 2007. The Union's effort to schedule multiple bargaining dates has been met by management's refusal and failure to meet.

This is not fair to the members of the Bristol Manor Nursing Center. The Union believes that they deserve better treatment. I offer bargaining dates of February 28, 29 and March 4th , 2008. Please choose one of these dates and call me to confirm or make suggestions for other dates. Please get back to me on this matter.

Thereafter, according to Saint Hilare, the parties scheduled a meeting for March 12, 2008. Saint Hilare testified, without rebuttal, he called Jasinski and informed him that the mediator would not be available on that date, but that he felt that the parties needed to have a meeting. Jasinski agreed, and the meeting was arranged. Thereafter, on March 6, Saint Hilare sent a letter to facility administrator Giles asking that the bargaining committee members be released for the meeting. On March 6, Jasinski sent the following letter to Saint Hilare:

We are in receipt of a letter dated March 6th concerning Bristol Manor. There is a mistake or misunderstanding on your part because we have no negotiation session on that date. I am sure that you know that. Mr. James Kinney, FMCS is not available on that date due to other matters that he is handling and will not attend this negotiation.

Since the mediator was brought into this negotiation by you, we are somewhat surprised that you would schedule a session without his attendance. In any event, we believe that his attendance is helpful and necessary to move the process along.

Please communicate with Mr. Kinney to get other dates for this negotiation. Thank you.

On March 8, Saint Hilare replied as follows:

I am writing to follow-up on our conversation last week and the letter that was addressed to you on February 22, 2008 regarding Bristol Manor. On February 25, 2008 we agreed to meet for Bristol Manor on March 12, 2008 even though we knew the mediator was not going to be available. I already advised the Bargaining Committee and the nursing home administration of that meeting.

This additional refusal to meet on March 12, 2008 and bargain a fair contract for the employees at Bristol Manor proves that management is negotiating in bad faith.

The Union would like to suggest that we meet on the designated date March 12, 2008 or the morning of March 11 before Castle Hill bargaining. Please choose one of these options and call me to confirm your decision or if you have any other suggestions. Please get back to me on this matter

Thank you for your anticipated cooperation.

On March 10, 2008 Jasinski replied as follows:

We are in receipt of your letter dated March 8th. Your statement that we have engaged in bad faith bargaining is disingenuous and insulting.

The Employer is the one who has proposed dates and the Union was unavailable for a variety of reasons. You pitted one group against another. You failed to show any concern and we are not about to accept your lies without responding to them. At the table, the Union proposed little discussion and no counter proposals to our language. It was the Union that proposed the involvement of the FMCS and we agreed. Now, you are suggesting the FMCS is not necessary – well we disagree and you cannot stop what you started.

Based on all of the facts, it is clear to us that the Union is engaging in bad faith bargaining and avoiding getting a contract. Despite the Union's delay and stall tactics, we are prepared to meet to negotiate a contract. At this point, I suggest the mediator be advised and he should offer available dates for all parties to continue negotiations.

Thank you.

Saint Hilare testified that at times he offered to "piggy back" negotiations for Bristol Manor on dates scheduled for other facilities, or to negotiate for Bristol Manor on a date which had been scheduled for another Omni facility, but that Jasinski refused to do so.

20. On April 1, 2008 Respondent Provides Additional Information to the Union

By letter dated April 1, 2008, Jasinski sent additional information to the Union as follows:

We provide you with the following information:

1. Amount of overtime for the previous year varied each week based on a number of factors including call-outs and unavailability of staff. Nevertheless, it is fair to estimate that overtime hours typically ranges from 100-300 hours per week over the previous year.

2. Number of no-frills employees: 0

3. Agency Usage: None as of April 1, 2008

4. OSHA: See attached [24]

[24] Enclosed was the OSHA log for 2007.

5. Monthly insurance premiums:
289 Single
526 E+1
647 Family

As we have previously stated across the table, nothing has prevented the Union from engaging in negotiations. To the contrary, the Union has made proposals and counterproposals including a comprehensive contract proposal. Upon receipt and review, if you have any additional questions or comments, we respectfully request that you respond in writing.

On cross-examination, Jasinski admitted that the Employer maintained records showing the overtime worked by individual employees. He also stated that providing such documents to the Union would have been "cost prohibitive." Although Jasinski claims he told the Union of this fact, he did not offer any specific testimony regarding when he may have done so.

21. The Union's Response to Respondent's April 1, 2008 Letter and Submission

On April 9, Saint Hilare responded as follows:

I am responding to your April 1, 2008 letters regarding the Union's outstanding request for bargaining information. While you sent four separate letters for each of the facilities in question, your statements were almost identical for each facility. Unless otherwise indicated, my comments below relate to all four facilities.

Request 1: Your response to the Union's request for overtime information is inadequate. You state, "it is fair to estimate" for all four facilities that overtime hours "typically range from 100-300 hours per week over the previous year." The Union requested the number of overtime hours worked on a quarterly basis in 2006 and 2007 for each bargaining unit employee. Your generalized estimate is not sufficient.

You provided contradictory information on the number of no-frills employees.

Requests 2 and 3: You continue to deny that the facilities use agency workers.

Request 4: No schedules were provided.

Request 5: After all these months, you finally produced OSHA logs for 2007 on April 1, 2008. You did not produce logs for 2005 and 2006.

Request 6: No documents provided.

Request 7: Thank you for finally providing the monthly insurance premiums in your April 1, 2008 letter.

The piecemeal fashion in which the information has been provided and the failure to provide all the information requested, even these many months later, has made these negotiations particularly difficult. Now that we have information regarding health insurance and health and safety, we will provide you with revised proposals at our next bargaining sessions at all four facilities. Once we receive the remaining information, we will present further proposals.

22. Respondent Cancels a Bargaining Session Scheduled for April 14, 2008

Saint Hilare had contacted Jasinski to set another bargaining date and the parties agreed to meet on April 14, 2008. At some point prior to the meeting, however, Jasinski telephoned Saint Hilare and stated that he had double-booked his schedule and that, due to other professional obligations, he was unavailable to meet. There is no evidence that Jasinkski offered other bargaining dates at this time.

23. Respondent's April 18, 2008 Response to the Union's April 9 Letter

On April 18, 2008, Jasinski replied to Saint Hilare's April 9 letter as follows:

We are in receipt of your letter dated April 9th. At the inception of these negotiations, the Employer provided the Union with a complete response to the Union's request for information. Nonetheless, on April 1, 2008, we provided a supplemental response in response to information requested by you. Instead of expressing appreciation, you claim that the failure to provide the Union with additional information - which is largely irrelevant, not in our possession, and/or easily ascertainable - has made these negotiations difficult.

Let's be clear. The parties have been negotiating for months. As we previously stated across the bargaining table and in prior correspondence, the Union has been fully capable of putting forth full economic proposals and counterproposals. Indeed, you have made proposals covering every economic item. The additional information being sought is neither relevant nor necessary to continue bargaining. Rather, it reflects the Union's delay and stall tactics and its warped purpose of avoiding a contract that addresses this facility.

As always, we are fully prepared to continue negotiating in good faith. Nonetheless, if the Union is unwilling to continue bargaining without the rest of the requested information, please let us know. Otherwise, the Union should be prepared to negotiate a contract that balances the needs of this facility and its employees.

Thank you.

24. The May 2008 Letters Regarding Continued Negotiations

On May 6, 2008, Jasinski sent the following letter to Saint Hilare

As you are aware, we have been involved in a number of negotiations involving a number of employers. There have been times that you have cancelled the negotiation session or have been unavailable due to other contract negotiations. Nevertheless, to move this negotiations forward, please provide us with several dates and times to meet regarding the contract negotiations for the above referenced facility. Once I receive this information, I will get dates from my client.

Saint Hilare denied cancelling any negotiation sessions during this period of time, and Respondent presented no specific evidence that the Union had done so.

Thereafter, on May 8, Jasinski wrote to Saint Hilare as follows:

Since SEIU 1199 New Jersey requested the direct involvment of the FMCS and the appointment of the mediator, we request that any and all communications regarding this negotiation be conveyed through Mr. James Kinney. If you wish to propose andy dates for the negotiations, propose them in writing first to Mr. Kinney.

On May 15, 2008, Jasinski proposed dates for negotiations, as follows:

On May 6, 2008 we forwarded you a letter requesting dates for continued negotiations of the referenced collective bargaining agreement, unfortunately, you have not proposed any dates for negotiations.

We are available on May 26, 27, 29 and June 2, 2008 to continue the negotiations. Please advise if one of the dates is acceptable. If not, please propose alternate dates.

Thereafter the parties exchanged correspondence regarding their preferred meeting dates and times. The Union stated that the evening hours proposed by the Employer would cause personal hardship for the employee members of the bargaining committee. Nevertheless, it was eventually agreed that they would meet, as the Employer had proposed, in the evening of May 27.

25. Respondent Provides an Updated Employee List to the Union

On May 19, 2008, Jasinski sent the Union an updated employee list. Saint Hilare and McCalla testified that this document did not answer their outstanding questions regarding health coverage for employees since it did not contain such information for a number of employees, and several others were listed as having no insurance. The combined number of employees in these classifications exceeded the contractual limit on no-frills employees. In addition, for the first time, the document showed that two employees were designated as being in the no-frills category.

26. The Sixth Bargaining Session – May 27, 2008

Due to illness, McCalla did not attend this meeting. Saint Hilare's bargaining notes for this session indicate that, due to Gold's late arrival, the meeting began more than one hour later than had been scheduled. Saint Hilare reminded management that the Union had not received all the information it had requested and stated that it was impossible for the Union to really discuss health insurance without knowing how much the Employer was contributing for each employee. The Union objected to the manner in which the overtime information had been given to the Union, as an average, and stated that given the Employer's proposal to cut daily overtime, it needed to know who was going to be affected by the proposal, and could not make such a determination from the information in the manner in which it had been provided. The Union asked about no-frills employees and pointed to employees who did not have health insurance but who were working full time and receiving the same hourly pay as employees who were receiving such benefits. According to Saint Hilare, in response to Union inquiries at another table the Employer had offered general explanations about why employees might not have health insurance, but would not address the issue at this meeting as it related to specific employees. [25]

[25] McCalla's bargaining notes for the Castle Hill negotiations indicate that such explanations had been offered at a session conducted on April 9, 2008. The reasons offered by the Employer for employees' apparent lack of health coverage included that the employee might not have

Continued

Saint Hilare presented a modification of the Union's prior economic proposal which provided for a four-year agreement resulting in hourly minimum salaries of $23 for LPNs, $10 for dietary employees, $11 for CNAs and $10.25 for recreation employees effective as of September 2010. The Union reduced the pension contribution to 2.5 percent, and sought a $400 signing bonus for employees. It additionally put forward a revised health insurance proposal whereby the Employer would not be required to make full payment for dependent coverage until an employee had completed 10 years of service.[26] The Union additionally put forward new proposals regarding paid time off and uniform allowance. Saint Hilare also asked the Employer to recognize the KL Agreement as the "master agreement" with regard to language issues.[27]

The Employer caucused and upon returning to the meeting put forward a counter-proposal for a five-year agreement, a signing bonus of $100, a wage increase totaling 14.7 percent over the life of the contract and minimum salaries of $20, $9.25 and $ 8.25 per hour for LPNs, CNAs and Grade 1 employees, respectively. The proposed no-frills rate was $2 per hour.

As Jasinski noted, the Union made no changes to its language proposals and continued to reject the Employer's elimination of daily overtime. Jasinski testified that, notwithstanding the Union's objections to the extent of the Employer's responses to the Union's information request, it had not been hampered in putting forward its proposals on this, or any other occasion. Jasinski further noted that the Union brought up the fact that two employees had been listed on the most recent roster as being no-frills employees. He stated that he told the Union that it had been his understanding that there had been no such employees, and if he was wrong, he was wrong with respect to two employees.

Saint Hilare's notes indicate that as the session drew to a close he asked for another date for bargaining. According to Saint Hilare, Jasinski had previously been made aware, and it was reiterated at this meeting, that Saint Hilare would be unavailable for much of the month of June due to a Union convention and a planned vacation. Jasinski replied that he did not have his schedule with him and that Saint Hilare should call him to set up another date.

27. On May 28, 2008, Respondent Sends Additional Information to the Union

On May 28, Jasinski wrote to the Union, enclosing certain information that previously had been requested from Respondent:

> *We enclose the following additional documents responsive to the Union's request for information:*
>
> *1. Total overtime hours by quarter for 2006 and 2007;*

---

sufficient tenure or hours to qualify or simply had neglected to sign up for coverage.

[26] For the first five years of employment, the employee would pay for dependent care. After this point, the Employer would assume 50 percent of the cost and the share of the Employer's burden would increase by 10 percent each year until the employee had completed ten years of employment.

[27] Saint Hilare testified that he also presented the Employer with a wage proposal but this is not reflected in his notes, nor did he offer any details of such a proposal. On cross examination, Saint Hilare admitted that he was not certain whether the Union had modified its prior wage proposal.

2. OSHA Reports for 2005 and 2006;
3. New Jersey State Reimbursement Reports for 2005 and 2006; and
4. the following department schedules:
a. Dietary Department (12/30/07-5/16/08)
b. Housekeeping Department (12/23/07-4/26/08)
c. Nursing Department (1/6/08-4/26/08)

These are all of the responsive documents in our possession. Additionally, as we previously stated, there were no agency personnel used by this facility in the requested time period.

We continue to await dates for continued negotiations at this facility.

McCalla testified that the overtime information provided by Respondent in this letter was not responsive to its requests for individualized information and, therefore, did not enable the Union to fully investigate the potential impact the proposed elimination of daily overtime would have on individual employees.

28. On June 10, 2008, the Union Responds to Respondent's May 28 Submission

On June 10, Saint Hilare sent Jasinski the following reply to his May 28 letter and the information provided therein:

We received the information accompanying your May 28, 2008 letter. As you know, we have been seeking this information since April 25, 2007. Your piecemeal production has greatly impaired our ability to bargain. Further, the information you provided still is not complete.

I must also point out that since early April, 2008 at Castle Hill bargaining, I requested updated information for all four facilities. With respect to the documents produced with your May 28, 2008 letter, the production remains incomplete.

1. Overtime hours: You did not provide overtime hours for each employee as requested for any of the four facilities. Rather, you provided a total quarterly amount for all employees, presumably across all bargaining unit job titles for 2006 and 2007. Given the employer's proposal on the elimination of daily overtime, the receipt of this information is necessary.

At the April, 2008 session at Castle Hill, we questioned you about your response to our request for overtime information. We told you the information was necessary given your daily overtime proposal. You replied that the rough estimate you provided was all that you had to give us. We need the overtime information for June 1, 2007 through May 31, 2008, as well as for the period stated in the April 25, 2007 request. We also need it in the form described in our April 25, 2007 letter, i.e., on a quarterly basis for each employee.

2. OSHA reports: none were provided for 2005 at Harborview.

3. Cost Reports: It does not appear that you provided the complete and final reports as the copies provided did not contain Schedule H, the provider's certification. In addition, other pages were missing from the 2006 and 2005 reports for Castle Hill. In my February 14, 2008 letter I also asked you to provide the 2007 reports as soon as they are

prepared by your clients; to date, no 2007 reports have been provided.

4. Schedules: The schedules you provided do not show all individuals who were actually working on the floors. There are daily schedules in nursing which show on a single page all individuals who actually work on all shifts on all units. Please provide the daily schedules for February 1, 2008 through the present. In addition, the LPN schedules for Harborview were provided only for one month and not even all shifts for that month. Finally, only about four months of schedules were provided for each of the four facilities.

5. Agency information: You stated in your May 28, 2008 letter that "there were no agency personnel used by this facility in the requested time period." What do you mean by requested time period? In your previous correspondence and at bargaining, you claimed that none of the facilities used agency workers. Are you now saying that agency workers have been or are being used since March 2007? If so, please provide the information regarding agency usage, as requested paragraphs 8 and 9 in my April 25, 2007 information letter for all four facilities during the period from March 2007 to the present time.

6. No-frills: You have not clarified the contradictory information provided to us on April 1, 2008.

Thank you for your anticipated cooperation.

29. Respondent's June 17, 2008 Reply to the Union's June 10 Letter

On June 17, Jasinski wrote to Saint Hilare in response to the assertions made in his June 10 correspondence:

We are puzzled by your June 10th response to the information we provided with our May 28th letter. In our letter, we informed you that we have provided you with all of the information in our possession. Yet, you insist that our production somehow "remains incomplete."

It is readily apparent that the Union has absolutely no interest in using any of this information for legitimate purposes at the bargaining table. Rather, the Union's strategy is to use these information requests to avoid real bargaining and to try to avoid reaching impasse. Instead of continuing your bad faith conduct by putting forth irrelevant and harassing information requests, I suggest that you refocus your energies to engage in meaningful bargaining so that the parties can reach a contract for the benefit of our employees.

We respond to your specific allegations as follows:

1. The approximate average overtime worked per employee are as follows:

1st Quarter 2006 - 60 hrs
2nd Quarter 2006 - 80 hrs
3rd Quarter 2006 - 82 hrs
4th Quarter 2006 - 88 hrs

1st Quarter 2007 - 64 hrs
2nd Quarter 2007 - 75 hrs

3rd Quarter 2007 - 78 hrs
4th Quarter 2007 - 92 hrs

Moreover, contrary to your assertion, our proposal was not to eliminate overtime. To the contrary, all bargaining unit employees will continue to be paid overtime compensation on a weekly basis. We stated this at the bargaining table. You have failed to provide any specifics that any employee would be hurt by our proposal.

2. As you concede, we provided you with all the requested OSHA reports.

3. We provided you with the 2005 and 2006 cost reports in their entirety. We provided you with these cost reports even though they are typically not considered to be relevant in negotiations, and you have not demonstrated any need for these documents. Troy Hills Nursing Home, 326 NLRB 1465, n.2 (1998). We are uncertain what "Schedule H" is or what possible relevance a provider's certification has to the negotiations. Accordingly, please provide us with the specific reasons why you consider such information relevant to the bargaining.

4. We provided you with all the schedules in our possession. We cannot provide them in a form which does not exist.

5. This facility did not utilize agency personnel from March 2007 through the present.

6. Currently, Bristol does not have any employees in the no-frills category. We fail to understand what "clarification" is needed.

We recognize that you are currently away on vacation. In fact, we know that you have been unavailable since the end of May. We suggest that you propose dates in July and August that will not conflict with your schedule.

Thank you.

30. Respondent's June 23, 2008 Letter

On June 23, 2008, Jasinski sent Saint Hilare the following letter:

Since he has not heard from the parties for several weeks, Mr. James Kenny contacted me concering the status of negotiations. At that point, I was puzzled that the Union has not contacted us or the mediator. Nevertheless, I expressed a willingness to meet if he thought it would be beneficial.

At the last session, the Union brought up subjects that had nothing to do with negotiations for a contract. We responded. Nevertheless, we have [not] heard from the Union.

We have no desire in prolonging this negotiation longer that (sic) is necessary. It is now almost one (1) year since the contract expired and after numerous sessions, the Union is well aware of our position. If you are interested in meeting, I suggest you contact Mr. Kennye who will propose dates for the meeting. Your silence is making these negotiations more difficult and we have a number of vacations that limit our availability. Thank you.

31. Respondent Declares Impasse and Issues its Final Offer

On July 3, 2008 Jasinski sent the Union a letter together with what was characterized as its final offer, as follows:

We are fast approaching the one-year anniversary of the expiration of the referenced collective bargaining agreement. Since the expiration of the contract, the Employer met with the Union and its committee in numerous bargaining sessions. In these sessions, the Employer responded to the Union's proposals and offered a complete contract containing terms and conditions as well as addressing all economic issues. The exchanged proposals and counter-proposals were made on our part in a good faith attempt to reach an amicable resolution for a new collective bargaining agreement.

These numerous sessions with counter-proposals demonstrate there is a difference of opinion between the parties on a number of things, including, but not limited to, wages, health benefits and paid time off. It has been over one month since we last met with the Union. The Mediator, as well as this office has tried to contact you -- all attempts have been unsuccessful. It is apparent to us that the Union has shown no interest in meeting to resolve this collective bargaining agreement and refuses to move from its fixed positions.

Because of the Union's inactions and unwillingness to modify its proposals, we are at an impasse. Enclosed, please find the Employer's final offer, which we will implement July 11, 2008. The implementation of this final offer is based on a number of factors including, but not limited to, the Union's fixed positions in the contract negotiations and failure to meet.

Should you have any questions or want to discuss this matter further, please call the undersigned.

* * *

FINAL OFFER
BRISTOL MANOR HEALTH CARE CENTER
and
SEIU 1199 NEW JERSEY

TERM: Five (5) years, to be effective upon ratification by members.

ELIGIBILITY: Employees who are regularly scheduled and work thirty (30) hours or more per week shall receive full benefits. The working time shall be defined as per the Employer's Workweek proposal.

Employees who are regularly scheduled and work twenty (20) hours and less than thirty (30) hours shall receive benefits on a prorata basis. The working time shall be defined as per the Employer's Workweek proposal.

WAGES

BONUS: $175.00 - Full time employees
$90.00 - Part time employees

NO-FRILLS: *$2.50 per hour above the minimum in the job classification for all employees who waive all contract economic benefits.*
$1.50 per hour above the minimum in the job classification for all employees who waive all economic benefits with the exception of paid holidays, sick days, personal, if any, and vacation days.

Twenty-five (25) no-frills positions.

Upon ratification or implementation by the Employer: three percent (3%) ncrease.
Twelve (12) months after ratification: two percent (2 %) increase
Eighteen (18) months after ratification: two percent (2%) increase.
Twenty-four (24) months after ratification: three percent (3%) increase.
Thirty-six (36) months after ratification: two percent (2%) increase.
Forty-two (42) months after ratification: two percent (2%) increase.
Forty-eight (48) months after ratification: three percent (3%) increase.

Increases shall not be added to minimums.

***New Minimum hiring rates as follows**:*

	CNAs	*Grade 1*	*LPNs*
Upon ratification:	*$8.75*	*$8.00*	*$19.00*
Twenty-four (24) months after ratification	*$9.25*	*$8.50*	*$20.00*
Forty-eight (48) months after ratification	*$10.00*	*$9.00*	*$21.00*

Employees shall receive the increase to the new minimum or the general increase, whichever is greater.

EMPLOYEES EMPLOYED PRIOR TO RATIFICATION SHALL RECEIVE THE FOLLOWING BENEFITS:

HOLIDAYS: *-Nine (9) designated holidays*
- Employee's birthday
-One (1) personal day
-One (1) additional personal day after five (5) years of continuous service

SICK DAYS: *Nine (9) sick days*

VACATION: *CNAs, Dietary and Housekeeping and Recreational Aides*
Five (5) paid days - Upon completion of one (1) year of continuous employment.
Beginning of third (3rd) year of continuous employment, eligible employees begin to accrue ten (10) paid days.
Beginning of the sixth (6th) year of continuous employment, eligible employees begin to accrue fifteen (15) paid days.
Beginning of the sixteenth (16th) year of continuous employment, eligible employees begin to accrue seventeen (17) paid days;

Beginning of the twenty first (21st) year of continuous employment, eligible employees begin to accrue twenty (20) paid days

LPNs – maintain current schedule

HEALTH INSURANCE:
As provided by the Employer.

PENSION: *Two percent (2%) of all eligible full-time covered employees' wages for hours physically worked, as defined in the Employer's Pension Article.*

LIFE INSURANCE:
Increase to a total of $15,000.00.

1199 TRAINING AND UPGRADING FUND:
One half percent (1/2%) of hours physically worked for eligible employees for hours physically worked. Eligibility and hours physically worked are defined as per the Pension Provision in the Employer's proposal.

UNIFORM: *Increase to $3.00 per week for all full-time employees. This amount shall be pro-rated for eligible part-time employees.*

EMPLOYEES HIRED AFTER RATIFICATION:

HOLIDAYS: *Eight (8) designated holidays*
Employee's birthday

SICK DAYS: *Earn one (1) day for every two (2) months of continuous employment.*

VACATION: *CNAs, Dietary and Housekeeping and Recreational Aides:*
Upon completion of the first (1st) year of continuous employment five (5) paid days.
Beginning of the third (3rd) year of continuous employment, eligible employees begin to accrue ten (10) paid days.
Beginning of the eleventh (11th) year of continuous employment, eligible employees begin to accrue fifteen (15) paid days.
Beginning of the twenty-first (21st) of continuous employment, eligible employees begin to accrue seventeen (20) paid days.

LPNs – Maintain the current schedule

HEALTH BENEFITS: Same as all other employees.

PENSION: *Same as all other employees.*

LIFE INSURANCE: Same as all other employees.

UNIFORMS: Same as all other employees.

TRAINING AND UPGRADING: Same as all other employees.

As the General Counsel notes, this final offer differed in certain respects from Respondent's previous offers at the bargaining table. For example, with regard to no-frills employees, the final offer provided for a two-tier system, increased the allowable number of slots to 25 and paid the no-frills rate over the minimum in the job classification, none of which had been previously proposed during negotiations.[28]

32. The Union Responds to Respondent's Declaration of Impasse and the Final Offer

On July 9, Saint Hilare sent the following letter to Jasinski:

I just received your letter dated July 3, 2008. It obviously crossed with the letter I sent out to you earlier on July 3 in which I proposed a bargaining date on which both the mediator and I are available. As you were aware, I was out of the office and on vacation for most of June.

I dispute in the strongest terms that the parties are at impasse. You continue to fail to provide all the information requested. Our last bargaining session was very brief because Mr. Gold was more than one hour late. We also asked a number of questions about the Employer's health plan such as why employees who appeared to be eligible for health insurance under your proposal were not covered and why deductions were made from paychecks for "free" dental benefits. You have not responded to those questions.

Your claim that you are imposing your "final offer" because the Union has been unwilling to modify its proposals and its "inactions" is preposterous. It has been the Employer, not the Union that has failed to meet to bargain and canceled scheduled sessions. The Union has repeatedly modified its proposals and as recently as our last session. The proposal I received today from you was never previously presented. For example, you never had a proposal for 25 no frills employees. The Union has not had the opportunity to discuss it with the committee and the Union has a number of questions about it.

Further, the impact of short staffing at Bristol Manor and the increased usage of the agency employees have become especially acute and I just learned that during my vacation employees conducted a spontaneous protest over the impossible working conditions and difficulty in providing patient care that have resulted from understaffing. The Union bargaining committee has finally had the chance to review schedules that you belatedly produced on May 28, 2008 (almost a year after they were requested and which remain incomplete). This information has influenced proposals that the Union intends to discuss at our next session.

[28] Although Respondent's changes to the method in which pension and training fund contributions were to be made differed from the Employer's current obligations under the 2002 MOA, the proposal had been included (although not highlighted) in the compilation agreement and was again set forth in its entirety in the contract proposal given to the Union on October 25, 2007. In disagreement with the General Counsel, therefore, I do not find that this proposal differed from what had been put forward by the Employer during contract negotiations.

Given that the parties are not at impasse, the Employer's unilateral imposition of your "final offer" violates its duty to bargain in good faith. Instead of threatening to impose, I suggest you accept the bargaining date I offered earlier in my letter of July 3, 2008 and approach the bargaining table with some flexibility so we can finally settle this contract.

Thank you for your anticipated cooperation.

33. The Union's Subsequent Information Request

On July 23, 2008, Saint Hilare wrote to Jasinski asking for information regarding agency usage and requesting further bargaining. His letter is as follows:

I am writing to follow-up our discussion on July 17, 2008 during the Castle Hill bargaining regarding information on agency workers as well as the number of employees who do not have health insurance coverage. As explained, the Union will need to formulate proposals. This letter also is a follow-up to the July 7, 2008 regarding the Union's outstanding information requests for Bristol Manor, Castle Hill and Harborview bargaining

At the Castle Hill bargaining on July 17, 2007, employer conceded after having repeatedly denied using agency workers, that agency workers have, in fact, been in used at Castle Hill to provide temporary staff. Based on that, the Union requests:

1. Names of all agencies used by the employer to provide temporary staff;

2. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and job title for each agency employee provided to the employer during the periods January 1, 2008 through July 22, 2008.

3. At bargaining, Castle Hill also agreed to provide a seniority list of the employees with explanation on why some employees who are working the required number of hours do not have health insurance coverage. You recall that at that session, the Union provided a list of names with question mark beside names for employees who do not have health insurance coverage.

Please provide the information listed above as well as the outstanding information described in my July 7 letter. Please also let me know which dates you are available to bargain for Castle Hill, Harborview and Bristol Manor.

There is no evidence that the Employer responded to this letter or otherwise provided the Union with additional information prior to August 2009.

C. Stipulations and other Evidence as to Changes in Employees' Terms and Conditions of Employment

The parties reached the certain stipulations regarding the changes to employees' terms and conditions of employment as a result of Respondent's implementation of its final offer. In particular, the parties stipulated that prior to the implementation of the final offer in July 2008, employees were paid overtime pay for hours worked in excess of 7.5 hours per day. After July 13, the Employer ceased paying daily overtime to its employees. In addition, there was a partial implementation of a $3 uniform allowance after July 13. Further, the employer implemented its

no-frills proposal, consistent with the final offer, which among other things establishd a two-tier new frills system and a new pay scale. Prior to the implementation of the final offer, employees who were regularly scheduled to work and worked 20 or more hours per week were eligible to receive health insurance. After the implementation of the final offer, employees working more than 20 but less than 30 hour per week are no longer eligible to receive health insurance.

Jasinski testified generally that the Employer had implemented its last, best and final offer. When asked whether the Employer had adhered to its terms, he offered the following testimony:

> With regard to the contribution to the pension the employer continued to comply with the terms of the expired collective bargaining agreement and the formula that was set forth in the expired collective bargaining agreement, the employer has complied or continued to comply with that formula.
>
> With regards to all the other tems, I believe it has been consistent, yes.[29]

D. Bargaining Resumes in August 2009

1. Additional Information is Provided to the Union in August 2009

As noted above, employees at Bristol Manor engaged in a three-day strike in August 2009 and a meeting between Employer and Union representatives was scheduled for August 28. On August 21, 2009, Jasinski sent a letter to McCalla including updated information regarding the costs for health insurance coverage including single, employee plus one and family coverage. On August 24, 2009, the following letter and enclosed information was sent to Union counsel Ellen Dichner:

> *This letter supplements the latest information request made by the Union. The facility has not utilized any agency personnel. With regard to overtime, each facility has provided overtime distribution information, reported by quarter and overtime usage per employees. Distribution of overtime corresponds to the needs of the facility and the request by employees for overtime work. The long-standing policy regarding overtime and the distribution of same complies with theterms and conditions as set forth under the expired collective bargaining agreement.*
>
> *With this additional information, we believe that we are fully responsive to the Union's requested information, and look forward to the Union's complete proposal at the next scheduled bargaining session.*

Enclosed with this letter was information relating to overtime (which was broken down per employee, per quarter), no-frills employees, updated gross payroll figures and work schedules. The information sent showed that approximately 28 employees who appeared to qualify for health insurance were not receiving it. Eleven employees were designated as no-frills employees.

[29] Such testimony supports the Union's contention that it is the signed and dated version of the 2002 MOA which is the governing agreement. As has been discussed above, the pension proposal set forth in the final offer was consistent with the terms of the unsigned 2002 MOA. Jasinski's testimony suggests that the actual method of contribution varied from the terms of the final offer and, therefore, from the terms of the unsigned 2002 MOA.

2. The August 28, 2009 Meeting [30]

This meeting took place at the Union headquarters in Iselin, New Jersey. The negotiators at this meeting differed somewhat from the parties' prior meetings. Saint Hilare had been reassigned and was not present. The Union was represented primarily by its attorney Ellen Dichner and McCalla. Jasinski and Gold were assisted by another attorney, James McGovern. Union president Millie Silva attended as did a number of employees from the Omni facilites. The mediator attended, as well.

According to McCalla, Dichner made a presentation regarding the issues that separated the parties in terms of language, and McCalla made a similar presentation with respect to economic matters. The Union provided the Employer with a written contract proposal which, with some exceptions, reflected the Union's position as of May 27, 2008. Another year of the contract had been added with additional wage increases. The proposal included new language regarding staffing and a pension appendix which set forth the method by which pension fund contributions were to be calculated so as to clarify what the requirements were for participation in the Union's fund.[31] The Union had additionally proposed that contributions commence after 90 days of employment as opposed to one year, as had been the case under the 2002 MOA. In addition, the Union incorporated language which reflected the status quo with respect to issues such as overtime and paid time off for which they were seeking no change. The proposal further included the language counter-proposals which had been submitted to the Employer in October 2007, and for the first time made specific reference to the KL Agreement.[32]

The Union asked whether the Employer had a proposal on economics. They did not have one for the meeting, but stated that the Union's proposal would be reviewed and a counter-proposal would be put forward in the future. Dichner asked for a document in word format which represented the Employer's last, best and final offer and the Employer committed to providing such a document to the Union. Dichner additionally requested up-to-date information on the bargaining unit. According to McCalla, a great deal of information was provided at the meeting and Dichner clarified what was still expected.

The meeting ended with the expectation that the parties would meet again and the Employer would submit a counter-proposal on economics.

E. The Alleged Failure to Remit Pension Contributions

1. The Amendment to the Complaint

The charge in Case No. 22-CA-28153, as originally filed on December 3, 2007, alleges, in relevant part, that: "Since in or about July, 2007, the above named Employer through its

[30] McCalla's testimony regarding this meeting is set forth in Volume 7 of the transcript. I note for the benefit of anyone who may review this record that there is a discrepancy in the manner in which the pages have been numbered as contrasted with other volumes.

[31] According to McCalla, the Employer's proposed pension language, as contained in the compilation agreement and its final offer, would have been unacceptable to Fund trustees. The Union's proposal as put forward on August 28 also eliminated certain enumerated exclusions from the definition of gross wages which had been set forth in the 2002 MOA.

[32] The Union's proposal provided that: "any provision of the KL New Jersey Labor Group contract and subsequent memoranda of agreement that is not modified during these negotiations shall remain in full force and effect during the life of the agreement. "

officers, agents and representative David Jasinski has failed and refused to furnish information to the Union necessary to collective bargaining negotiations."[33]

On April 9, 2009, the Union amended that charge to add the following allegation: "Since in or about July 2007, the above-named Employer unilaterally failed to make pension fund contributions without notifying or bargaining with the Union." The regional office mailed the amended charge to the Respondent and its counsel of record on April 10, the following day. Following an investigation, on May 22, 2009, Counsel for the General Counsel issued a notice of intention to amend the complaint to allege that since on or about February 1, 2007, the Respondent unilaterally refused and failed to make pension fund contributions without notifying or bargaining with the Union, and so moved at the opening of the hearing.

Respondent objected to the proposed amendment, arguing that it was barred by the Section 10(b) statute of limitations and that it was predicated on a different theory from the original charge. In its brief, Respondent raises certain additional defenses to the proposed amendment. In particular, Respondent argues that only the SEIU National Industry Pension Fund (the Fund) has standing to raise such a claim and that the Fund is neither a party to the charge nor to the collective-bargaining agreement. In this regard, the Respondent argues that the Union has no right to raise this claim on behalf of the Fund. Respondent additionally denies the material allegations of the amendment.

At the hearing, I granted General Counsel's motion to amend the complaint to include this additional allegation. See generally, *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774 (1997); Board Rules and Regulations Section 102.35(a)(8)(administrative law judge in an unfair labor practice case has authority, on the motion of any party, to order proceedings consolidated or severed).

The evidence adduced with respect to this allegation consisted primarily of the testimony of Betsy Blount, who has been employed by the Fund since 2000 in various positions, together with certain documentary evidence which was maintained in the Fund's files, as will be discussed below.[34]

2. Background

By letter dated November 22, 2002, the Union's then-attorney, Richard M. Greenspan, forwarded to the Fund a copy of the pension appendix executed by the parties in conjunction with the 2002 MOA. Beginning in about August 2002, contributions were remitted. However, payments for employees of Respondent were made by three entities. Bristol Manor made, and apparently continues to remit, contributions for the dietary employees of the facility. However, contributions for the certified nurses aides were drawn on the checks of an entity called Healthcare Staffing & Consultants, LLC (Healthcare). Contributions on behalf of the recreation employees were drawn on the checks of Sunshine Recreation, LLC (Sunshine).

---

[33] There is another allegation, contained in the charge as filed in December 2007, that the Employer falsely presented to the Union a document purporting to represent existing terms and conditions of employment, which is not a subject of the instant complaint.

[34] The testimonial and documentary evidence relating to this allegation of the compliant was adduced in a proceeding involving Castle Hill Health Care Center, Case Nos. 22-CA-28152 and 22-CA-28548. The parties stipulated the testimony and documentary evidence into the record herein.

Some four years later, on November 5, 2006, SEIU international representative Larry Alcoff sent an e-mail to Fund collections manager Jack Salm about remittances for the Omni employees:

> *Jack,*
>
> *I want to follow up on the list of pension issues in NJ that we discussed on the phone last week:*
>
> *Omni Mgmt group (Castle Hill, Bristol Manor, Palisades and Harborview) -The Employer is a party to 4 separate CBA's with the Union. The Employer has made contributions for the past 4 years pursuant to those CBA's; however the Pension Fund failed to deposit those checks. The Employer provided a letter to the Pension Fund over 1 year ago stating that the nursing homes were the parties to the agreement and the Employer. The Pension contributions were made by their contracted payroll operations. We requested that the Pension Fund deposit all checks and give members appropriate service and vesting credit.*
>
> *We have not received any reports or copied correspondence (whether to the Employers or legal documents) to date. Please reply.*

On November 8, 2006, Sahm replied to Alcoff's e-mail with the following inquiries:

> *In item three of your e-mail, you mention Omni Management Group. The checks we have are from Healthcare Staffing & Consultants LLC and Sunshine Recreation, LLC. A couple of questions-*
>
> *1. Who are the CBA's with – Omni Management Group or the individual properties?*
> *2. Please forward copies of the four (4) CBA's that you mentioned in your e-mail*
> *3. Is Heathcare staffing now out of the picture?*
>
> *As for item 2 of your e-mail, we are in the process of putting toether all of the information for our Collection Counsel. We will keep you apprised of all developments.*

Later that day, Alcoff replied:

> *We will send you the 4 most recent MOUs with Bristol Manor, Harborview, Palisades and Castle Hill. Healthcare Staffing is not relevant.*

There is no record evidence of any further communications between Alcoff and Sahm regarding these matters.

3. <u>The Alleged Failure to Remit Contributions</u>

In May 2007, Blount was promoted to the position of Fund collection manager.[35] Prior to that time she served as an assistant manager in the Fund's processing department. As Blount testified, after an employer and a local union execute a collective-bargaining agreement, the contract is submitted to the Fund to ascertain that it conforms to Fund requirements and is then submitted to Fund counsel for final approval. Once such approval is granted, the collection

[35] She currently serves as the Fund's benefits processing manager.

department establishes a computer file with an employer number and site number. If the contract is not approved, it is returned to the parties with a letter indicating the language necessary for compliance with Fund requirements.

Blount testified that after she became collection manager, she was assigned to investigate a group of checks that the Fund did not have contracts for and determine who they belonged to. These were the checks drawn on the accounts of Healthcare and Sunshine. As Blount testified, because Healthcare and Sunshine were not parties to collective-bargaining agreements, files had not been created for them in the Fund computer database and they were not recognized as employer participants.

Thereafter, the Fund trustees determined that, inasmuch as Healthcare and Sunshine were not parties to collective-bargaining agreements authorizing the Fund to accept their contributions, the remittances should be returned. Accordingly, on October 10, 2008, Blount wrote separately to Healthcare and Sunshine as follows:

> *Please find enclosed checks issued by [Healthcare] [Sunshine] for the period of August 2003 through January 2007.*
>
> *Unfortunately, the SEIU National Industry Pension Fund (NIPF) has been unable to process these payments because we have not reveived a signed copy of the Collective Bargaining Agreement (CBA) between [Healthcare] [Sunshine], and SEIU Local 1199 NJ which requires contributions to the fund. The NIPF has made numerous attempts to Local 1199NJ to obtain a signed copy of the CBA, which have been unsucessful.*
>
> *In accordance with a recent Board of Trustee decision, to return contributions to employers without an acceptable CBA on file with the Fund within 6 months or more after the receipt of the first contribution payment, we are returning and refunding all checks that have been received from [Healthcare] [Sunshine]. In addition, most of the checks are older than 6 months and would have to be reissued upon receipt of the acceptable CBA.*
>
> *Please be advsied that we will not accept any future payments from [Healthcare] [Sunshine] until we receive an acceptable signed copy of the CBA. Lastly, please keep in mind that once an acceptable CBA is received late fees and interest wil be assessed on contribution payments older than 30 days.*

A copy of this letter was sent to the SEIU Local 1199NJ President Milly Silva.

As Blount testified, after this letter was sent, Silva and Union attorney Ellen Dichner contacted her to discuss why the Fund had decided to return the contributions from Healthcare and Sunshine. A conference call was scheduled on two prior occasions, but did not occur until February 9, 2009.

On February 9, a telephonic conference was held among Blount, Silva, Dichner and other Fund personnel. Blount explained that the Fund did not have signed contracts with Healthcare and Sunshine and that therefore, the pension contributions were returned to these vendors. Silva and Dichner maintained that the local union had sent the Fund copies of the applicable MOAs and urged the Fund to search their files for the relevant documents.

Blount testified that at that point she undertook an investigation and learned that Healthcare and Sunshine had been contributing for CNAs and recreation employees,

respectively, at Bristol Manor. She additionally learned that both Healthcare and Sunshine had ceased making contributions to the Fund as of January 2007.[36]

The last check sent by Healthcare, dated May 9, 2007, is for contributions applicable to January of that year. Similarly the last check sent by Sunshine, dated May 8, 2007, is for January 2007 contributions to the Fund. Both checks are attached to rosters of covered employees which reference the various Omni facilities by name. Blount offered no explanation as to why these reports would not have, or did not, assist the Fund in ascertaining which employees the contributions were being made on behalf of.

At some point after the February 2009 conference call, the Fund advised the Union that the Employer had ceased remitting contributions for periods after January 2007. The Union was further told that the Fund had reversed its decision to refund contributions to Healthcare and Sunshine and that both vendors would be set up in the Fund's system pursuant to the 2002 MOA.

On April 9, Fund collection manager Miriam Gibbs wrote to Healthcare and Sunshine advising as follows:

> *A letter was sent to you dated October 10, 2008, notifying you that the SEIU National Industry Pension Fund was unable to process your payments due to non receipt of a signed collective bargaining agreement. . .*
>
> *We have subsequently received signed collective bargaining agreements, enabling the Fund to properly setup your account. The initial date of contribution is September 1, 2002. Contributions are presently due for September 1, 2002 through March 31, 2009. Additionally, remittance reports are due for the following periods: September 2002 through July 2003 and January 2007 through March 2009.*
>
> *Although the National Industry Pension Fund will accept the collective bargaining agreement for the term of July 25, 2002 thorugh July 24, 2007, any new agreements requiring contributions to the National Industry Pension Fund must adhere to the terms of the enclosed Bargaining Basics Manual. For example:*
>
> *1. Pension contributions are required on all bargainining unit employees from date of hire or no later than 90 days of employment and all other employees (such as temporary, casual, on-call, extra, seasonal and no frill) are covered after 1,000 hours of employment.*
>
> *2. The CBA must specify the pension contribution rate as a flat dollar amount or a percentage of pay. The minimum contribution rate is $0.15 per hour for all new contracts and renewals with effective dates after July 1, 2004.*
>
> *3. The CBA must clearly state that the pension contributions are to be remitted to SEIU National Industry Pension Fund.*
>
> *4. All employers must agree to be tound by the NIPF Trust Agreement.*

[36] Blount offered no explanation of why she did not become aware of this in October 2008, when she returned the remittances to Healthcare and Sunshine.

There was no response to these letters. However, it appears from the record that subsequently, in August 2009, both Healthcare and Sunshine made contributions to the Fund on behalf of Bristol Manor employees.

III. Analysis and Conclusions

A. The Alleged Failure to Provide Information

The complaint alleges and General Counsel contends that the following information sought by the Union is presumptively relevant or, alternatively, that its relevance has been demonstrated: documents showing overtime hours worked by bargaining unit employees on a quarterly basis in 2006 and 2007, [37] the names of no-frills employees, the names of agencies used by Respondent for temporary staff and copies of invoices showing names, number of hours worked, rates billed and job titles for each agency employee, copies of work schedules, OSHA injury and illness reports for 2005, 2006 and 2007, copies of Medicaid cost reports for 2005 and 2006 and per-employee monthly premium cost for employer-funded single health insurance. The General Counsel further contends that, since October 19, 2007, the Employer has either failed and refused or unlawfully delayed in providing such information to the Union. As discussed in further detail below, Respondent contends that it sufficiently complied with the Union's information requests to allow it to meaningfully bargain and that the Union's repeated requests were interposed in bad faith, for the purpose of delay and to forestall a valid bargaining impasse.

1. Applicable Legal Principles

It is well-settled that an employer's duty to bargain in good faith with the bargaining representative of its employees encompasses the duty to provide information needed by the bargaining representative to assess proposals and claims made by the employer relevant to contract negotiations. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435-436 (1967). *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 153 (1956).

Information pertaining to the terms and conditions of employees in the bargaining unit is presumptively relevant, and must be provided upon request, without need on the part of the requesting party to establish specific relevance or particular necessity. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995). In such an instance, the employer bears the burden of showing a lack of relevance. *AK Steel Co*., 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). Moreover, a union may rely upon the presumption of relevance of information pertaining to employees within the bargaining unit and has no further obligation to explain its significance, unless and until the employer establishes legitimate affirmative defenses to the production of the information. *Beverly Health and Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005). See also *Quality Building Contractors*, 342 NLRB 429, 430 (2004) quoting *Commonwealth Communications*, 335 NLRB 765, 768 (2001): "When a union seeks information pertaining to employees within a bargaining unit, the information is presumptively relevant to the union's representational duties, and the General Counsel may establish a violation for the

[37] The complaint additionally alleges a failure or delay in providing documents showing "regular hours of work." The General Counsel does not make specific reference to any such allegation other than the alleged failure to provide employee work schedules, which is discussed below.

employer's failure to furnish it without any further showing of relevancy."

Requests for matters outside the bargaining unit require a demonstration of relevance. *Shoppers Food Warehouse Corp*., 315 NLRB 258, 259 (1994); *Ohio Power Co*., 216 NLRB 987, 991 (1975), enfd. 531 F. 2d 1381 (6th Cir. 1976). The Board uses a broad, discovery-type standard in determining the relevance of requested information. Thus, the burden is not an exceptionally heavy one, requiring only that the desired information would be of use to the party in carrying out its statutory duties and responsibilities. *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *Shoppers Food Warehouse*, supra; *Richmond Health Care*, 332 NLRB 1034, 1035 (2000)(potential or probable relevance is sufficient to give rise to an employer's obligation to provide information). A party has satisfied such a burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information. However, the Board has also held that, as to non-unit information for which relevance must be demonstrated, the General Counsel must present evidence either that the union demonstrated the relevance of the non-unit information or that the relevance of the information should have been apparent to the respondent under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). The Union's explanation of relevance "must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." 350 NLRB at 1258 fn. 5 (citations omitted).

The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Woodland Clinic*, 335 NLRB 735, 736 (2006); *Good Life Beverage Co*., 312 NLRB 1060, 1062 fn. 9 (1993). "An employer must respond to the information request in a timely manner" and "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all." *Amersig Graphics, Inc*., 334 NLRB 880, 885 (2000); see also *Newcor Bay City Division*, 345 NLRB 1229, 1237 (2005) (and cases cited therein).

With regard to the Union's information requests generally, Respondent argues that the Union propounded such requests on Bristol Manor for reasons other than to move the bargaining process forward. In particular, Respondent argues that the Union's information requests were made to avoid meaningful bargaining and in a futile attempt to avoid reaching impasse. In support of this argument, Respondent contends that the Union repeatedly demanded information which had already been received, which was readily attainable or wholly unnecessary to the bargaining process or that it was not entitled to obtain. Respondent notes that it responded to the Union's initial information request prior to the first bargaining session and further argues that that the Union was able to, and did, make its initial "comprehensive" proposal relying on the information already within its possession, and did not require any further information prior to putting forth subsequent proposals. Respondent additionally argues that it sufficiently complied with the Union's repeated information requests, that it provided information to the Union on numerous occasions and, further, that any limited delay in providing information is not unlawful. To the contrary, as Respondent contends, the Union's repeated information requests constitute evidence of its bad faith in negotiations.

With regard to the issue of delay, in support of its contentions, Respondent relies upon *ACF Industries*, 347 NLRB 1040 (2006). There, the Board found that the union's information request was purely tactical and submitted solely for delay and to avoid impasse where the union requested the information after months of extensive bargaining, after the contract's expiration, after the union's rejection of the employer's final offer, and after the respondent declared it had

nothing left to offer.[38] By contrast, here, the initial information request was made prior to the expiration of the 2002 MOA and before bargaining commenced. Moreover, here the Union reiterated its requests throughout bargaining, well prior to Respondent's declaration of impasse and final offer. Similarly, in *Sierra Bullets*, 340 NLRB 242, 244 (2003), also cited by Respondent, the Board concluded that the pendency of an information request relating to an overtime proposal did not preclude a finding of impasse where the information request was not made until the 17th bargaining session, the proposal had not been made until the 16th session, the parties had been previously concentrating primarily on other core issues in bargaining and there was no convincing argument that the information would have broken a deadlock over these other core issues. Again, the circumstances in *Sierra Bullets* are not similar to those involved here, where, as both Saint Hilare and McCalla testified, the Union sought information throughout the bargaining process which was directly tied to proposals or anticipated counterproposals regarding such matters as the proposed elimination of daily overtime, a proposed increase in the allowable number of no-frills employees, staffing levels, medical insurance and the health and safety of employees in the workplace.

Respondent argues that the circumstances of the instant case are "strikingly similar" to those presented in *United Engines Inc*., 222 NLRB 50, 55-56 (1976). There, the respondent was charged with a delay in transmitting certain relevant data which the union sought in connection with bargaining negotiations until it was informed that the union had filed unfair labor practices with the Board. The administrative law judge found that the respondent had not violated the Act. In that case, the respondent never raised any objection to disclosure of the information sought by the union, characterized as "copious" and provided the bulk of it within one month of the Union's request. The only outstanding item was the information related to the employer's retirement plan, which the respondent said would be covered in a booklet and provided as soon as it was received. The booklet was then provided. Thereafter, as the judge found, the respondent "invited further requests" by the Union for additional information. Once such requests were made, the information was promptly furnished. [39]

Contrary to Respondent's suggestion, the Board has consistently found an unexplained delay in furnishing relevant information to be unlawful. See e.g. *Woodland Clinic*, supra at 736 (delay of seven weeks unreasonable, absent explanation); *Bundy Corp*., 292 NLRB 671, 672 (1989) (delay of over two months unreasonable, and explanation offered for delay inadequate); *Quality Engineered Products*, 267 NLRB 593, 598 (1983) (employer replied within two weeks, providing some information, but did not supply rest of information required until six weeks later and no explanation provided for "foot dragging"); *International Credit Service*, 240 NLRB 715, 718 (1979) (unexplained delay of six weeks unreasonable); Local 12 Engineers, 237 NLRB

---

[38] The Board additionally found that the parties had reached a good-faith impasse, and the union showed no interest post-implementation bargaining.

[39] In support of its contention that any delay in providing the Union with information was not unlawful, Respondent also relies upon *Good Life Beverage Co*., supra and *Union Carbide Corp*., 275 NLRB 197 (1985). In *Good Life Beverage Co*., the Board found that a five and one-half month delay in providing information was not unlawful where the information sought raised confidentiality concerns and the employer sought to discuss the matter to reach an accommodation with the requesting union for mutually agreeable protective conditions. Here, Respondent has pointed to no such circumstances. In *Union Carbide*, which dealt with a delay of over ten months, there was no showing that the requested information, which was voluminous, could have been produced any sooner, that there was any urgency in fulfilling the request and that it involved a matter currently or forthcoming in any negotiations between the parties.

1556, 1558-1559(1978) (information supplied six weeks after initial request and after charge filed); *Pennco Inc*., 212 NLRB 677, 678 (1974)(employer unreasonably failed to respond to information requests for over one month and did so only after charge filed).

In the instant case, while it appears that the Union requested a significant amount of information from the Employer initially, and subsequently, Respondent has failed to argue or to present any evidence that any alleged delay in providing information was due to the volume of that request, or Respondent's need for time to assemble it or receive documentation relative to such demands.[40] Moreover, the record fails to establish that Respondent raised any such objection to the Union. Nor has Respondent propounded such an argument here. Rather, as set forth above, Respondent consistently took the position either that it had fully complied with the Union's request or that the information sought was unnecessary for the Union to bargain.

Here, while it is undeniably the case that Respondent did provide information to the Union as had been requested, it is also apparent that some information was delayed and other information not provided at all. As the above-cited cases demonstrate, Respondent is not empowered to make a unilateral determination that presumptively or otherwise demonstrably relevant information sought by the Union is unnecessary or irrelevant to bargaining or the performance of the Union's statutory duties. To the contrary, Respondent's arguments in this regard are unavailing. "That the information appears unnecessary to an employer is obviously an inadequate ground for refusal …" *Amphlett Printing Company,* 237 NLRB 955, 956 (1978) Moreover, had the information sought by the union been provided in a timely fashion, it is reasonable that it could have been used to determine strategy and tactics in the negotiations: "Priority of issues, consideration of bargaining strategy as to trade-offs of economic and non-economic issues, even the nature and extent of the bargaining posture on the various issues might well have been impacted upon by such information and the need therefore would be current and present throughout the negotiations." *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1014 (1996). Moreover, as the courts have noted, the fact that a contract has been negotiated without the requested data does not render the information not relevant. See *NLRB v. Fitzgerald Mills Corp*., 313 F.2d 260, 266 (2d Cir. 1963); cert denied, 375 U.S. 834. In *NLRB v. Yawman & Erbe Mfg. Co*., 187 F.2d 947, 949 (2d Cir. 1941), the court stated:

> Nor is our determination that the information was relevant affected by the subsequent execution of a contract without disclosure. The most that can be inferred from the Union's action is that the advantages of a contract in hand outweigh those which the Union might later obtain when all relevant information would be available to it.

With the foregoing standards in mind, I will now evaluate the various information requests made by the Union and the Respondent's responses thereto.

2. Overtime Hours Worked by Each Employee on a Quarterly Basis

From the outset, even prior to the initiation of bargaining, the Union sought information showing the overtime hours for each employee on a quarterly basis for the years 2006 and 2007. Information regarding employee overtime, and in particular, overtime information worked by individual employees has been found to be presumptively relevant. *U.S. Information*

[40] In this regard I note that the Union initially made an information request in April 2007. The October 2007 and February 2008 requests referred to in the complaint, for the most part, reiterate this prior request to the extent it had not been complied with. Thus, it is apparent that Respondent had a significant period of time to assemble the information sought.

Services, 341 NLRB 988 (2004) (citing *Blue Cross & Blue Shield of New Jersey*, 288 NLRB 434, 436 (1988) (total hours and overtime hours worked "by each unit employee" is presumptively relevant). The record shows that after the October 19, 2007 letter, the Union renewed its request for such information both verbally and in writing on any number of occasions.[41] Moreover, the record shows that Saint Hilare advised Respondent that such information was necessary to enable the Union to properly evaluate the impact of its proposal to eliminate daily overtime.

On January 29, 2008, Jasinski stated that such information had been provided to the Union, which as the record demonstrates, is not the case. In fact, no overtime information whatsoever was provided to the Union until April 1, 2008, where it was stated that, "It is fair to estimate that overtime hours typically [range] from 100-300 hours per week over the previous year." The Union then advised Respondent that that was not the information which had been requested. Thereafter, on May 28, 2008, Respondent provided "total overtime hours by quarter of 2006 and 2007" but, again, did not provide the information for individual employees. On June 10, the Union reiterated its request for "overtime hours for each employee." On June 17, 2008, Respondent responded with the "the approximate average overtime worked" by employees for each quarter of 2006 and 2007. Over one year later, in August 2009, Respondent finally provided overtime information to the Union in the form, but not for the time frame, in which it had been initially sought in October 2007 and thereafter.[42]

Aside from its presumptive relevance, it is clear from the record that such information took on additional significance in light of the Employer's proposal to eliminate daily overtime. Thus, the Union has shown that this information was relevant and necessary to enable it to determine the impact the Employer's workweek proposal would have on the bargaining unit, both in relation to individual employees and to the unit as a whole.

I note that Jasinski admitted that the Employer maintained records of overtime hours worked by individual employees. He also testified, however, that he did not provide them to the Union because it was "cost prohibitive" and further claims to have told this to the Union. I do not credit Jasinski's testimony that he advised the Union that the information was too costly to produce as it is against the weight of all the credible evidence. I note that there is no reference to such a claim in Jasinski's repeated written communications to the Union, where it appears that he took every opportunity to document circumstances from Respondent's point of view. Moreover, such evidence was not adduced by Respondent in its direct case, and it appeared to have been an afterthought which came to mind during Jasinski's cross-examination.[43] Further, Respondent failed to substantiate at the hearing, in any quantifiable way, the time, expense or resources it would have to expend to comply with this request. *Goodyear Atomic Corp*., 266 NLRB 890, 891 (1982), enfd. 738 F.2d 155 (6th Cir. 1984). Moreover, even if there were substantial costs involved in providing such information in the form sought by the Union, Respondent has failed to show that it discussed this with the Union or offered to bargain with the Union over a means to lessen its burden, or to share the costs of production, as it is obliged under Board law to do. *Hospital Episcopal San Lucas*, 319 NLRB 54, 57 (1995). In short, Respondent has advanced no convincing rationale for its unilateral and continuing refusal to provide such information. Accordingly, I find that by failing and refusing to provide the Union with overtime hours worked by each bargaining unit employee on a quarterly basis in 2006 and

[41] February 14, April 9, June 10, July 7, July 11 and July 23, 2008.

[42] The information was provided for four quarters in 2008 and the first two quarters in 2009.

[43] I further note that Respondent does not rely upon this testimony in its post-hearing brief.

2007, as alleged in the complaint, Respondent has violated Section 8(a)(1) and (5) of the Act.[44]

3. The Identification of No-Frills Employees

On October 19, 2007, the Union requested, as it had done previously, that the Employer identify all no-frills employees. According to Jasinski, the Employer responded to this request initially at the negotiation session on July 13, 2007 when it told the Union that there were no employees in that category. Saint Hilare testified that there was no in-depth discussion at the time and Gold maintained that the employee roster spoke for itself. Nevertheless, it appears from Saint Hilare's and McCalla's testimony regarding subsequent bargaining sessions that the parties discussed the issue on several occasions: Employer maintained there were no no-frills employees and the Union was skeptical of the veracity of this claim due to the number of employees without health insurance.

On January 29, 2008, Jasinski wrote that the information had already been provided. On April 1, 2008, Respondent told the Union that there were no such employees in that category. Thereafter, on May 19, 2008, the Employer provided an updated employee list to the Union. That list showed two housekeeping aides identified as no-frills employees. According to the employee roster these individuals were hired in July and September 2007, and Respondent has presented no evidence that they opted for no-frills status at a later date, so it is appears that Respondent's continued representations that there were no such employees were either incorrect or deliberately false. I note that while Jasinski acknowledged he may have been wrong with respect to these two employees, Respondent has failed to explain why it had previously told the Union that there were no no-frills employees when two were apparently on its payroll. Respondent has argued that the Union never provided it with specific names of employees suspected of being no-frills employees. Not only is this contention unsupported by the record, it is unavailing. Saint Hilare's testimony that he presented Gold with an employee roster indicating those employees whose status was questioned was unrebutted. Moreover, as it is the Employer who compensates employees and pays for their benefits, such information is clearly within its particular dominion and control. Further, in its letter of June 17, 2008, Respondent continued to maintain that there were no employees in the no-frills category, notwithstanding the contrary information contained in the employee roster provided on May 19. Thus, the information provided to the Union on this issue was inconsistent and contradictory, at best.

The issue of whether bargaining unit employees have agreed to forfeit contractual benefits in exchange for an increased wage rate, and who has agreed to do so, is presumptively relevant. Moreover, the record demonstrates that the issue of whether there were no-frills employees was related to various matters under consideration during negotiations. As noted above, the Employer had proposed increasing the limit on such employees from 10 to 20. As both Saint Hilare and McCalla testified, the Union had questions about why this proposal had been made if, in fact, no employees were currently in the no-frills category.

Thus, the record establishes that the Employer provided the Union with incorrect information on numerous occasions, and did not actually identify the no-frills employees, as the Union had requested in its October 19, 2007 letter, until May 19, 2008. There is, therefore an unexplained delay of seven months in providing such information to the Union.

[44] Saint Hilare's June 10, 2008 letter updates this request for the period from June 1, 2007 to May 31, 2008. On August 24, 2009 overtime information for 2008 and the first two quarters of 2009 were provided.

Accordingly, I find that Respondent delayed and failed to provide accurate information regarding the no-frills status of its employees in violation of the Act.

4. The Use of Agency Employees

The Union's October 19, 2007 letter sought the names of all agencies used by the Employer to provide temporary staff and invoices showing the names, number of hours worked, rate(s) billed and job title for each employee provided to the Employer during the period from January 1, 2006 through March 31, 2007. The Union reiterated its request for information regarding the use of agency employees on several occasions thereafter, both at the bargaining table and in writing. Although Saint Hilare had not spoken to any agency employees, he had had received anecdotal evidence, coming from employees, that agency LPNs were being used during the period of time the parties were bargaining. Such hearsay evidence is sufficient to support an information request. *Magnet Coal, Inc*., 307 NLRB 444 fn. 3 (1992), enfd. mem. 8 F.3d 71 (D.C. Cir. 1993).

The information requested is clearly relevant to the Union's concerns, as bargaining representative, of the nature and extent of the use of workers outside the unit who are being used to supplant the unit work force. *Lenox Hill Hospital*, 327 NLRB 1065, 1098-1069 (1999); *United Graphics*, 281 NLRB 463, 465 (1986). Information concerning the identity of such workers, their classifications, wages and the length of time employed at the facility are relevant to determine what Respondent was willing to pay for temporary employees to perform the same work as that performed by unit employees. See *Globe Stores*, 227 NLRB 1251, 1253-1254 (1977) (names, rates of pay, and store of employment of group managers performing the same tasks as rank-and-file employees). Similarly information regarding the names of the agencies used by Respondent is relevant as it provides an independent basis for the Union to conduct an investigation regarding the extent to which unit work is being displaced. Moreover, the relevancy of such information would have been apparent to the Respondent, and I note that Respondent has never contended otherwise.

It is undisputed that Respondent repeatedly told the Union that no agency employees were being used at the facility. Saint Hilare's testimony establishes that the Union raised this issue as early as the second bargaining session, on July 13, 2007. Jasinski's bargaining notes for that day also illustrate that the issue was discussed, but do not contain specific notations about the nature of the discussion. In asserting that the Respondent failed to provide information regarding agency usage to the Union, the General Counsel argues as follows: "Though Respondent denied agency employee usage such denial is contrary to the information the Union had obtained from employees in the unit. Indeed, contrary to his own denial, Jasinski testified that Respondent used agency workers during the Union's recent strike on August 7, 2009 and testified that Respondent most probably used them *prio*r to the strike as well." (Emphasis in original). In disagreement with the General Counsel, I find that he has failed to meet his burden in this regard; that is, to show that the facility employed agency personnel either during the time frame encompassed by the Union's information request (the period specified in the complaint) or during the period from June 2007 to May 2008 during which the parties were bargaining and queries were repeatedly made by the Union.

The only evidence offered by General Counsel to demonstrate agency usage consisted of the hearsay evidence, primarily second-and third-hand, offered by McCalla and Saint Hilare regarding employee reports regarding Respondent's use of agency employees, which is not corroborated by any independent, probative evidence. In disagreement with General Counsel, I do not find Jasinski's testimony to constitute an admission that Respondent was using agency employees during any particular period of time except, perhaps, during the three-day strike in

August 2009, and even then his testimony consists merely of an acknowledgement that he had heard about a "temporary agency called Tri-State Account Services" during that time frame. There is no evidence as to what services this agency provides; nor is there any specific evidence that these services supplant work performed by bargaining unit employees. Jasinski's initial acknowledgement (which he later retracted) that bargaining committee employees may have made reference to Tri- State is not sufficient, in my opinion, either to show that Respondent was using the services of this agency at the time, or, more importantly, that it was being used to supplant work done by unit employees. Similarly, Jasinski's acknowledgement that it was "possible" that the facility could have used Tri-State prior to the strike is not of sufficient probative value for me to draw any specific conclusion. This is far short of an admission that Respondent was using agency employees at any relevant period of time.

I note that while the General Counsel has maintained that the Medicaid cost reports contain information regarding agency usage, no attempt was made to utilize such reports to question witnesses on this issue or to otherwise adduce independent evidence of agency usage.[45]

Accordingly, inasmuch as it is not contested that Respondent told the Union that no agency employees were being used during the relevant period, and there is no evidence to establish the contrary, I find that the evidence is not sufficient for me to conclude that the Respondent unlawfully failed and refused to provide information to the Union regarding agency usage, as alleged in the complaint.

5. Work Schedules

The complaint alleges that the Employer failed and refused or, alternatively, delayed in providing employee work schedules to the Union. In his October 19, 2007 letter, and at various other times throughout bargaining, Saint Hilare requested such information for the periods of October through December 2006 and January through March 2007. In letters dated January 29 and February 20, 2008, Respondent did not dispute that such schedules were maintained and stated that they would be provided under separate cover. However, it was not until May 28, 2008, that Respondent provided work schedules for the dietary, housekeeping and nursing departments for the period beginning in late-December 2007 and continuing through April 2008.[46] On June 10, 2008, Saint Hilare responded that the submission was not fully responsive to the Union's request. Saint Hilare also made an additional request for the daily schedules for February 1, 2008 through the present. On June 17, 2008 Jasinski wrote that the Employer had provided the Union with all the schedules in its possession and that it could not provide the information in a form which does not exist. Thereafter, on August 24, 2009, Respondent produced additional schedules for May and June, 2009.

Such information, as it relates to bargaining unit employees, is presumptively relevant. *Wayneview Care Center*, 352 NLRB 1089, 1115 (2008). Moreover, it is relevant to the Union's investigation of employee complaints regarding staffing and agency usage and would be of use to the Union in effectively generating and bargaining over proposals such matters. Respondent has failed to explain the delay in providing work schedules to the Union, or to offer any valid explanation of why it could not fully comply with the Union's initial request for their production. Accordingly, I find that Respondent has unlawfully delayed and refused to provide the Union

[45] General Counsel pointed Jasinski's attention to one entry in the 2005 report, but pursued it no further.

[46] Schedules for the dietary employees were provided through mid-May 2008.

with work schedules of bargaining unit employees, as alleged in the complaint.

6. OSHA Injury and Illness Records

The Employer maintains OSHA records which document on the job injuries and illnesses. On October 19, 2007, the Union requested copies of such records for 2005, 2006 and 2007. In his January 29, 2008 letter, Jasinski stated that the facility did not maintain such records. The record establishes that this assertion was contrary to the practice at the facility. The Union's request for OSHA logs was renewed in Saint Hilare's letter of February 14, 2008. Thereafter, on April 1, Respondent provided the log for 2007. On April 9, 2008, Saint Hilare reiterated the Union's request for years 2005 and 2006. Those records were provided on May 28.

As the Board has found, workplace safety is a mandatory subject of bargaining. See *Kohler Mix Specialties*, 332 NLRB 631, 632 (2000). Accordingly, the Board has found that OSHA logs and other health and safety information is presumptively relevant. *Honda of Hayward*, 314 NLRB 443, 451 (1994). Moreover, Saint Hilare and McCalla testified that such records would be of assistance to the Union in formulating its health and safety proposal. Respondent has failed to rebut the presumption that this information is relevant or to offer any valid explanation of why it failed to provide such information to the Union for more than six months after the October 19, 2007 request.[47] Accordingly, I find that Respondent unlawfully delayed the production of OSHA logs for 2005, 2006 and 2007, as alleged in the complaint.

7. Medicaid Cost Reports

On October 19, 2007, the Union requested copies of Medicaid cost reports for 2005 and 2006. These reports are voluminous, and there is evidence that the Union's research department makes use of them to obtain general information about the size, finances and operations of the nursing home. McCalla testified that reports contain information about staffing and agency usage; however he further testified that he did not have familiarity about where such information could be located.

On January 29, 2008, Respondent replied that the information was readily available from the state, and that the Union had demonstrated that they are already in possession of such information. On February 14, Saint Hilare wrote: "We understand but do not agree with your position that you need not provide Medicaid cost reports and other related data because this information is available from other sources. Kindly furnish the 2007 report as soon as it is available." On April 9 Saint Hilare noted in a letter to Jasinski that the reports had not yet been received. The documents sought by the Union were provided by Respondent on May 28, 2008.

Respondent has argued that this information is not relevant and that by seeking such information, the Union has demonstrated its bad faith.

Respondent's apparent position, as stated to the Union, that it was under no obligation to provide the requested data because it could have been gotten from public records is not supported by extant Board law. To the contrary, the duty of an employer to provide relevant information in its possession is not excused by the fact that it may be obtained elsewhere. *Kroger Co.*, 226 NLRB 512, 513-514 (1976); *People Care, Inc.*, 327 NLRB 814, 824 (1999);

[47] Obviously with regard to this, as well as other, requests, the Employer had been put on notice some six months previously that the Union was seeking such information.

Orthodox Jewish Home for the Aged, 314 NLRB 1006, 1008 (1994).

I do not agree with Respondent that the Medicaid cost reports do not contain relevant information. Rather, I find that, inasmuch as they contain primarily non-unit information, their relevance must be demonstrated. Here, I find that there is doubt about whether the Union, at any point during negotiations, sufficiently articulated "with some precision" the basis for its request or demonstrated why such documents would be relevant to bargaining or to any of the Union's other statutory duties and responsibilities. *Disneyland Park*, supra at 1258. I note that neither McCalla nor Saint Hilare testified that they ever specifically stated to the Employer why the Union was seeking this information, and there is no such explanation in any of the correspondence in the record.[48]

In *Troy Hills Nursing Home*, 326 NLRB 1465 fn. 2 (1998), the Board denied the General Counsel's motion for summary judgment as to the respondent's failure to provide Medicare and Medicaid cost reports, finding that they appeared to seek financial information, were not presumptively relevant and that the union had not demonstrated the relevance of such information to the employer. Here too, I find that the General Counsel has failed to meet its burden to show that the Union established the relevance of the information or that such relevance would have been apparent to Respondent. *Disneyland Park*, supra.[49] *New Surfside Nursing Home*, 330 NLRB 1146 (2000), cited by the General Counsel, reached a contrary result. There, however, the administrative law judge specifically found that the union agent "explained why the cost reports were relevant to negotiations." 330 NLRB at 1148. The Board, in affirming the judge, specifically noted that the Union had demonstrated the relevance of the information sought. Here, there is no such evidence and, therefore, I cannot reach a similar conclusion.

Inasmuch as I find that the Union failed to demonstrate the relevance of the Medicaid cost reports and, further, that the General Counsel has not sufficiently established that their relevance would have been apparent to the Employer, I do not find that Respondent has violated the Act by delaying their production.

8. Health Insurance Premium Information

On June 21, 2007, the Employer provided the Union with the total cost for health insurance premiums for 2006 and the first quarter of 2007. The Union had also previously been provided with the cost to employees for dependent coverage. What the Union did not know was the cost to the Employer for its employees' single coverage and, therefore, Saint Hilare requested such information during bargaining session, and reiterated this request in his letter of October 19.

---

[48] Saint Hilare's October 19, 2007, February 14 and April 9, 2008 communications to Jasinski on this issue fail to state why the Union is seeking this information and are not sufficient to demonstrate its relevance.

[49] Both the General Counsel and the Union argue that the relevance of the reports lies in the staffing and agency information they contain. I note, however, that neither McCalla nor Saint Hilare could demonstrate how and where such information could be gleaned from the reports; nor does that rationale explain or justify why the reports were sought in their entirety. In any event, to the extent the Medicaid cost reports contain relevant information regarding agency use, my finding that the Employer generally has failed to provide such information subsumes such arguments.

On January 29, 2008, Respondent wrote that such information had already been provided. By letter dated February 14, Saint Hilare explained that the information had not been provided and could not be computed, as Jasinski had suggested, by dividing the cumulative cost furnished by the number of employees because the number of employees fluctuated from month to month. On April 1, 2008, Respondent provided the monthly insurance premium cost sought by the Union.

Respondent has argued that the Union did not need the monthly premium costs because it could have made that determination based upon the information that had been previously been provided in July 2007. Respondent additionally relies on McCalla's testimony that based on the aggregate figures supplied by the Employer, the Union could calculate the percentage of gross revenues spent on health insurance.

I find that Jasinski's general testimony on this matter failed to show that he sufficiently responded to Union's claim that per-employee medical costs could not be computed with any measure of precision.[50] More to the point, however, is the fact that whether or not the Union could have attempted to calculate the costs in the abstract, under the Board's standards, it was entitled to receive such information which would have been of use to it in arriving at a more exact figure. See *Albertsons, Inc*., 310 NLRB 1176, 1187 (1993) (employer's claim that union could determine amounts of contributions to trust fund from plan documents did not excuse the employer's failure to provide its own information on the actual contributions made where this information would allow the union to verify the information found in the plan).

The Board has held that premiums paid under health insurance plans are wages, and as such, information regarding premiums is presumptively relevant. *The Nestle Company*, 238 NLRB 92, 94 (1978). Further, it is apparent that the cost of employee fringe benefits is of particular relevance during collective bargaining negotiations.

Moreover, in this case, such information related to an issue central to the parties during bargaining, i.e. whether the Employer would (or would not) agree to some measure of dependent coverage for its employees. Clearly, understanding the costs to the Employer of providing health insurance coverage for its employees might well be of some relevance to the Union in formulating a proposal to bridge the gap between the parties' positions. *Baldwin Shop N' Save*, 314 NLRB 114, 124 (1994).[51] Accordingly, I find the delay in providing such information to be unlawful.

For the reasons set forth above, I find that Respondent has failed and refused or unlawfully delayed in providing information, as alleged in the complaint, as follows: documents showing the number of overtime hours worked by each bargaining unit employee on a quarterly basis in 2006 and 2007; the identification of no-frills employees; copies of work schedules; OSHA injury and illness reports for 2005, 2006 and 2007; and the per-employee monthly premium cost for

---

[50] Jasinski testified that it would be possible to divide the total cost of insurance by the number of employees. As Saint Hilare noted, however, such a formula fails to account for the monthly fluctuation in the number of employees.

[51] In *Baldwin Shop' N Save,* supra at 124, fn. 8, it was noted that in *Sylvania Electric Products v. NLRB*, 358 F.2d 591 (1st Cir. 1966), cert. denied 385 U.S. 852, the court held "that the Board could properly find that a union was entitled to information concerning the cost of welfare benefits, where the union sought 'better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay.'"

employer-funded single health insurance. In this manner, Respondent has violated Section 8(a)(1) and (5) of the Act.[52]

B. The Alleged Cancellation of Bargaining Sessions and Refusal to Meet and Bargain

The complaint alleges that Respondent failed and refused to meet and bargain with the Union by unilaterally cancelling bargaining sessions scheduled between October 25, 2007 and May 27, 2008. Respondent has denied the material allegations of the complaint and asserted that at all times it bargained with the Union in good faith and that the Union has been the party to fail to bargain in good faith.

Section 8(d) of the Act requires an employer to meet at reasonable times with the collective bargaining representative of its employees, *Monmouth Care Center*, 354 NLRB No. 2, slip op. at 54 (2009)(and cases cited therein). *Pavilion at Forrestal Nursing and Rehabilitation*, 346 NLRB 458 (2006).The Board has long-held that the duty to bargain:

> Encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for collective bargaining sessions when they are requested, and in the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance.

J.H. Rutter-Rex Mfg. Co., 86 NLRB 470, 506 (1949)

Moreover, considerations of personal convenience, including geographic or professional conflicts, do not take precedence over the statutory demand that the bargaining take place with expedition and regularity*. Caribe Staple Corp., 313 NLRB 877, 893 (1994); Nursing* Center *at Vineland*, 318 NLRB 901, 905 (1995).

The evidence adduced by the General Counsel establishes that Respondent cancelled four bargaining sessions: November 5, 2007 and February 20, March 12, and April 14, 2008. The first of these sessions was ostensibly due to illness; I note, however that there is no evidence that Respondent made any attempt to reschedule this meeting. The February 20 and March 12 sessions were cancelled due to the unavailability of the mediator and Jasinski's unwillingness to meet with the Union outside of his presence. Saint Hilare's testimony that the Union was ready and willing to meet notwithstanding the absence of the mediator was unrebutted, and the Union's position in this regard is clearly set forth in letters to Jasinski dated

---

[52] In his post-hearing brief, Counsel for the General Counsel asserts, for the first time, that Respondent unlawfully delayed in furnishing the Union with copies of the KL Agreement and other memoranda of agreement which had been entered into by the parties. As the General Counsel has noted in his brief, a request for these documents was included in Saint Hilare's October 19, 2007 letter. However, this request was neither alleged in the complaint as information sought and not timely produced, nor was this or any related allegation identified by the General Counsel as violation of the Act for which a remedy would be sought at any time during the hearing. Accordingly, I find that the matter was not fully litigated. Under such circumstances a violation of the Act cannot properly be found. *New Surfside Nursing Home*, supra at 1146, fn. 1. In any event, the remedy for such an allegation would be duplicative of what has already been recommended.

February 22 and March 8, 2008. I further note that Jasinski failed to specifically rebut Saint Hilare's testimony that, at the time the March 12 meeting was initially scheduled, both parties were aware that the mediator would be unavailable. Again, I note that there is no evidence that Respondent made any proactive attempt to reschedule these negotiations at a time when the mediator would be available. Moreover, the Union's efforts to "piggy-back" negotiations with those for another facility or substitute Bristol Manor for a previously scheduled meeting were rejected by Respondent for no apparent reason.

Thereafter, the April 14, 2008 negotiation was cancelled due to a professional conflict asserted by Jasinski. Again, there is no evidence that any contemporaneous effort was made to reschedule this meeting. In sum, the evidence shows that there was a hiatus of seven months during which the parties did not meet and bargain for a successor agreement.

Respondent has offered various explanations for the delay: that Saint Hilare made it clear that he wanted to conclude the bargaining for Castle Hill first, and that the other facilities would then fall into place; that the Union contributed to the delay; that Jasinski was concurrently negotiating for the other Omni facilities and that it was his practice to defer and not to meet outside the presence of the mediator once such an arrangement was put into place. None of these arguments, either standing alone or in the aggregate, are sufficient to excuse Respondent's conduct here.

As an initial matter, the evidence fails to support Respondent's contention that the Union focused on bargaining for Castle Hill before or to the exclusion of other facilities. It is true that in Saint Hilare's letter dated June 4, 2007, he stated: "The union suggests we start with Castle Hill." Saint Hilare denied insisting that Castle Hill negotiations be conducted or concluded first and I credit that testimony, and discredit Jasinski's testimony to the extent it suggests to the contrary. In this regard I find that all the other evidence adduced in this record shows that the Union was ready and willing to negotiate for Bristol Manor regardless of what was occurring at the Castle Hill table.

In particular, I note that the parties met on three occasions: June 20, July 13 and July 23 before bargaining for Castle Hill commenced on July 25, 2007. At the first meeting, the Union presented the Employer with a full contract proposal. Such conduct does not evince an intention to delay or avoid bargaining, and illustrates precisely the opposite. Thereafter, the parties met regularly and this practice continued until Respondent unilaterally commenced cancelling meetings without making any attempt to reschedule them. With respect to the alleged Union delay, I note that although Jasinski asserted, in his letter of March 10, 2008, that the Union was unavailable for dates proposed by the Employer, no probative evidence of this was presented, and there is no suggestion in the record that this was the case. Rather, the evidence establishes that the Union protested the Respondent's cancellation of bargaining meetings and offered Respondent various options to bring the parties back to the table, all of which were rebuffed.

With regard to the issue of the availability of the mediator, I credit Saint Hilare's testimony that the March 12, 2008 session was initially scheduled by the parties knowing that the mediator would be unavailable. I further find, based upon the evidence discussed above, that he made clear to Respondent that the Union would meet without the mediator. Moreover, Jasinski's reliance upon the unavailability of the mediator to excuse his cancellation of bargaining sessions is without support in Board law. As the Board has made clear, "an employer's obligation under Section 8(d) to meet at reasonable times with the employee representative is wholly independent of the willingness of any mediator to participate." *Success Village Apartments*, 347 NLRB, 1065, 1068 (2006)(quoting *Riverside Cement Co*., 305 NLRB 815, 818 (1991)); *Kurdziel Iron of Wauseon*, 327 NLRB 155, 162 (1998)(respondent's

insistence on the presence of a mediator at bargaining sessions constituted a refusal to meet and bargain.)

With regard to any potential professional conflicts Jasinski may have experienced, either with ongoing negotiations at other Omni facilities or any other business matter, I note that the Board has rejected the so-called "busy negotiator" defense: ". . . it is well settled that an employer's chosen negotiator is its agent for the purposes of collective bargaining, and if the negotiator causes delays in the negotiation process, the employer must bear the consequences." *Calex Corporation*, 322 NLRB 977, 978 (1997), enfd. 144 F.3d 904 (6th Cir. 1998).

Based upon the forgoing, I find that Respondent unreasonably cancelled bargaining sessions and unlawfully failed and refused to meet at reasonable times with the Union during the period from October 25, 2007 to May 27, 2008 in violation of Section 8(a)(1) and (5) of the Act, as alleged in the complaint.

C. The Alleged Unilateral Changes

The complaint alleges that in July 2008, Respondent implemented its final offer and unilaterally changed terms and conditions of employment for the Bristol Manor unit employees without the agreement of the Union and in the absence of a valid bargaining impasse. Respondent's answer denied these allegations of the complaint and asserts that it legally implemented its last best offer and that Respondent did not change any term and condition of employment for unit employees prior to reaching a valid impasse with the union.

1. Respondent's Claim of Impasse

a. Applicable Legal Standards

The Board considers negotiations to be in progress, and thus will find no genuine impasse to exist, until the parties are warranted in assuming that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *Cotter & Co*., 331 NLRB 787, 787 (2000), quoting *AFTRA v. NLRB*, 395 F. 2d 622, 628 (D.C. Cir. 1968); see also *Larsdale Inc*., 310 NLRB 1317, 1318 (1993), citing *PRC Recording Co*., 280 NLRB 615, 635, enfd. 836 F.2d 289 (7th Cir. 1987).

The Board does not lightly infer the existence of an impasse, and the burden of proving it rests on the party asserting it. *Naperville Ready Mix, Inc*., 329 NLRB 174, 183 (1999), enfd. 242 F.3d 744 (7th Cir 2001); *Serramonte Oldsmobile*, 318 NLRB 80, 97(1995), enfd. in rel. part 86 F.3d 227 (D.C. Cir. 1996). The existence of impasse is a factual determination that depends on a variety of factors, including the contemporaneous understanding of the parties as to the state of negotiations, the good faith of the parties, the importance of the disputed issues, the parties' bargaining history, and the length of their negotiations. *Taft Broadcasting Co,* 163 NLRB 475, 478 (1967), enfd. sub nom *AFTRA v. NLRB*, supra. The Board also considers the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. *Cotter & Co*., supra at 789; *Wycoff Steel*, 303 NLRB 517, 523 (1991). The Board further takes into account whether the parties continued to meet and negotiate. See e.g. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982). In short, the Board requires that both parties believe that they are "at the end of their rope." *Grinnell Fire Protection Systems Co*., 328 NLRB 585, 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. den. 534 U.S. 818 (2001)(and cases cited therein).

The Board has recognized that a bargaining stance where both sides merely maintain hard positions and each indicates to the other that it is standing pat is the rule in bargaining and not the exception. *PRC Recording Co*., supra (citations omitted). Where movement between the parties indeed occurs, the Board does not confine its examination of bargaining history solely to the item claimed to be at impasse. See *Sacramento Union*, 291 NLRB 552 (1988), enfd. 888 F.2d 1394 (9th Cir. 1981). Rather, the very nature of collective bargaining presumes that while movement may be slow on some issues, a full discussion of other issues may result in agreement on stalled ones: "Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." *Patrick & Co*., 248 NLRB 390 (1980), enfd. 644 F.2d 889 (9th Cir. 1981); *Sacramento Union*, 291 NLRB at 556 (citation and footnote omitted). Further, although a good-faith impasse temporarily suspends the duty to bargain, the parties are not permanently relieved of bargaining obligation: "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations which, in almost all cases is eventually broken, either through a change of mind or the application of economic force." *Charles D. Bonnano Linen Serv. v. NLRB*, 454 U.S. 404, 412 (1982)(internal quotation omitted).

In addition, "[a]n impasse does not destroy the collective-bargaining relationship. Instead, a genuine impasse merely suspends the duty to bargain over the subject matter of the impasse until changes in circumstances indicate that an agreement may be possible. Anything that creates a new possibility of fruitful discussion breaks an impasse and revives an employer's obligation to bargain over the subject of the impasse." *Pavilions at Forrestal*, 353 NLRB No. 60, slip op. at 1 (2008)(quoting *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1966)).

b. <u>The Effect of Respondent's Unfair Labor Practices on the Issue of Impasse</u>

The fact that Respondent had, during the period of time the parties were bargaining, committed other independent unfair labor practices strongly weighs against a finding that a valid impasse in bargaining had occurred.

As has long been recognized, a failure to provide information relevant to core issues separating the parties frustrates the bargaining process and precludes a finding of impasse. *Caldwell Mfg. Co*., 346 NLRB 1159, 1160 (2006). Similarly, information that is not produced in a timely manner may also prevent parties from reaching a lawful impasse. *Orthodox Jewish Home for the Aged*, 314 NLRB at 1008. As the Board has found: "A legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." *Decker Coal Co*., 301 NLRB 729, 740 (1991).

Here, the Employer's refusal to or delay in providing information related to mandatory subjects of bargaining such as overtime, health insurance, employee schedules and the health and safety of employees and went to core issues which were the subject of much discussion and debate over the months of negotiations, as has been discussed above.

As has been noted, Respondent asserts that because the Union did not need such information to make its proposals; the information sought was neither necessary nor relevant. In support of this contention, Respondent cites *Sierra Bullets LLC*, 340 NLRB 242, 244 (2003). In that case, however, the Board considered the "precise issue" of "whether the mere existence of any information request, regardless of its relevance to the core uses that separate the parties at the bargaining table" precludes a finding of impasse. The Board found that because the requested information in that case was irrelevant there was "no convincing argument that [providing the information] would have changed the fact that the parties were deadlocked." The

animating principle in that case, however, was whether the information sought was relevant; there was no suggestion that anything further was required. Thus, Respondent is incorrect in its apparent assumption that it must be shown that the information would have changed the course of bargaining. As has been observed by one court: "the Board has never required the establishment of 'but for' causation in absolute terms." *E.I. du Pont de Nemours, v. NLRB*, 489 F.3d 1310, 1315 (D.C. Cir. 2007) See also *Caldwell Mfg*. 346 NLRB at 1170 ("To the extent that there is uncertainty about what, if any, new proposals the Union would have made if it had been given the opportunity to review information . . . that uncertainty must be resolved against the Respondent, whose unlawful action created the uncertainty."); *Bryant & Stratton Business Institute*, 321 NLRB at 1014.

Moreover, Respondent's failure to meet and bargain with the Union for a period of seven months vitally undercuts any assertion that a valid good-faith impasse had been reached, and affects the calculus of several salient factors relevant to such a determination, as will be discussed below.

c. Consideration of Impasse Factors

1. The Parties' Bargaining History

While the Union or its predecessor Local 1115 have represented employees at Castle Hill for a number of years and have executed several MOAs, this was the first negotiation that was conducted by these particular principals and the record reflects that there were initial obstacles including the lack of a fully integrated recent collective-bargaining agreement for the parties to work from.

In support of its contention that impasse had been reached, Respondent notes that the negotiations spanned a period of over one year and many letters were exchanged during this period of time. *Richmond Electrical Services*, 348 NLRB 1001 (2006); *Lou Stechers Super Markets,* 275 NLRB 475 (1985). *J.D. Lunsford Plumbing*, 254 NLRB 1360 (1981). Respondent thus argues that it properly declared impasse under such circumstances.

The General Counsel argues that while six bargaining sessions had been held, there were many issues to be resolved that complicated the negotiations including the fact that Respondent had furnished the Union with a compilation agreement which did not accurately represent existing terms and conditions of employment and Respondent's continual non-compliance with the Union's information requests.

Here, the parties' bargaining history does not support a finding of impasse. Respondent continued to provide information to the Union in a piecemeal basis during the entire year of bargaining, up to and even after its declaration of impasse. As noted above, much of this information concerned itself with mandatory subjects of bargaining that were in dispute.

Moreover, the final meeting of the parties, on May 27, 2008, fails to demonstrate the sort of deadlock which would indicate impasse. I note that the parties exchanged economic proposals during this meeting. The parties discussed scheduling further negotiations and Respondent sent more information to the Union on the next day.

Subsequently, on June 17, Jasinski appeared to anticipate further negotiating sessions. In particular, he wrote: "We recognize that you are currently away on vacation . . . We suggest you propose dates in July and August. . ."

Jasinski thereafter wrote to Saint Hilare on June 23, complaining that the Union had not contacted Respondent or the mediator for several weeks. He nevertheless asked for further bargaining dates. On July 3, Jasinski sent the Union Respondent's final offer with an implementation date of July 11. He stated: "Because of the Union's inaction and unwillingness to modify its proposals, we are at impasse." The General Counsel argues that such assertions are disingenuous because Jasinski was well aware of Saint Hilare's unavailability during June and was seizing on the opportunity to prematurely declare impasse.

On July 9, after reviewing the final offer Saint Hilare wrote to Respondent, disputing the claim of impasse. He challenged Jasinski's claim of Union inaction, pointing out that the Union had consistently modified its proposals, up to and including the final bargaining session. He noted that the final offer contained proposals which had not previously been brought to the Union during negotiations and advised Respondent that the Union had further proposals to present.

From the record it is apparent that there were difficulties in the bargaining, Nevertheless, I find that the parties' bargaining history does not establish that the parties were at impasse at the time the final offer was implemented.

I note that the parties had not discussed language issues for many months. The Employer's non-economic proposals were presented on July 27, in the form of the compilation agreement and again on October 25, 2007. The Union's counterproposal was similarly put forward on that date. This proposal reflected concessions from the Union's initial offer. The history of negotiations, as described by the parties, shows that the Employer never substantively responded to this proposal. With regard to economic issues, I note that the wage proposals exchanged at the final meeting, on May 25, 2008, contained concessions from those put forward previously. Moreover, the letters initially exchanged after this bargaining session demonstrate that continued negotiations were anticipated by both parties subsequent to this meeting.

Further, I must note that Respondent's assertion that negotiations lasted over one year is specious: it can hardly claim to have been bargaining in good faith during a period of time when it was unilaterally and unlawfully cancelling bargaining sessions and rejecting any accommodation offered by the Union to schedule meetings at the parties' mutual convenience.

The evidence of the parties' final meeting, on August 28, 2009, does nothing to alter my conclusions. This meeting, which appears to have been prompted by a strike by Respondent's employees, revived the moribund bargaining relationship, and demonstrates that the parties have more to discuss and that further meetings can prove fruitful.

Thus, I conclude that the parties' bargaining history does not support Respondent's contention that the parties had reached a valid impasse at any time prior to the implementation of the final offer.

2. Good Faith of the Parties in Negotiations

Respondent accuses the Union of adopting a "take it or leave it" strategy, maintaining fixed positions and engaging in regressive bargaining throughout negotiations. Respondent accuses the Union of an effort to stall negotiations by insisting on reaching an agreement with the same terms as the Tuchman Agreement and/or the KL Agreement or no contract at all. In support of this contention, Respondent relies upon *Richmond Electrical Services*, supra; *J.D. Lunsford Plumbing*, supra and *Matanuska Electric Assn.*, 337 NLRB 680 (2002). In addition, as

noted above, Respondent has contended that the Union's information requests were purely tactical and made for the purpose of delay and to foreclose a finding of impasse. *ACF Industries*, 347 NLRB at 1043.

Based upon the credited evidence herein, I cannot conclude that the Union bargained in bad faith. I do not agree that the Union adopted a "take it or leave it" strategy or maintained a fixed insistence on obtaining either industry standards or terms in lockstep with those found in the Tuchman Agreement.

Initially, I note that it has been recognized that a union has the legitimate right to seek for its members the same or similar terms and conditions of employment that have been negotiated with other employers. *Teamsters Local 282 (E.G. Clemente Contracting)*, 335 NLRB 1253, 1255 (2001); *Mine Workers v. Pennington*, 381 U.S. 657, 665 (1965). In determining bad faith, the Board considers the totality of a party's conduct. *St. George Warehouse*, 341 NLRB 904, 908 (2004). Here, under all the circumstances, Saint Hilare's statement that the Union was seeking a "state-wide contract" is encompassed by the foregoing precedent.

While Saint Hilare articulated the Union's goals, there is no evidence that the Union negotiators stated that any issue was nonnegotiable or that had to be in lockstep with the terms of any other agreement. To the contrary, the record establishes that the Union made various concessions on non-economic issues which reflected an attempt to reconcile the parties' varying positions on matters such as probationary period, union activities and communications, discipline and discharge, transfers and promotions, seniority, layoff and recall and health and safety. Concessions were offered during bargaining regarding economic issues, as well, in particular regarding the term and effective date of the agreement and the date minimum salaries would take effect. Moreover, at the bargaining session on May 25, 2008, the Union presented the Employer with a significant modification of its proposal for family health coverage whereby the Employer would not pay any premiums for the first five years and then be subject to a sliding scale and would be liable for the full premium only after an employee had reached ten years of employment. In this regard, there is no probative evidence that the Union insisted on the Employer's participation in the GNYBF. They sought from the outset an improvement in benefit levels, but their written proposals made plain that the Employer retained the option to provide those benefits through another plan.

Matanuska Electric Assn., supra, cited by Respondent, is inapposite here. In that case the Board found that the union had engaged in stall tactics including taking the position that "all words are ambiguous" and insisting that the employer was obliged to explain its motivation. In addition, the employer stated that it was willing to continue bargaining if the union submitted a proposal showing movement, but the union failed to do so. 337 NLRB at 683-684. Those facts are clearly distinguishable from those presented by the circumstances of this case.[53] Similarly in *Teamsters Local 418,* 254 NLRB 953, 957 (1981), also relied upon by Respondent, the Board found that the union had violated the Act when it refused to meet or submit proposals to the employer until national negotiations were completed because, as the union's agents admitted, it was under a mandate not to sign a contract which differed from those of a master agreement. There, the union's bargaining was found to be a "sham." Here, despite Respondent's claims to the contrary, there is no such evidence or suggestion of such an intention in the Union's conduct during negotiations.[54]

[53] *Richmond Electrical Services* and *J.D. Lunsford Plumbing*, also cited by Respondent, are discussed below.

[54] Respondent and the Union point fingers at each other, alleging that their respective

Continued

Based upon the foregoing, I find that the evidence fails to support Respondent's assertion of bad faith on the part of the Union.

Respondent argues that the record demonstrates that it continually bargained in good faith. In support of these contentions, Respondent points to the fact that it agreed to the Union's proposed location for the bargaining sessions; extended the collective-bargaining agreement on two occasions; agreed to the appointment of a federal mediator; sought the Union's approval prior to implementing a holiday bonus and supplied information both prior to the initiation of bargaining and on numerous occasions thereafter.

Even assuming, however, that Respondent engaged in a period of good-faith bargaining, that would not necessarily establish that it was privileged to implement its final offer. "An employer that engages in a period of good-faith efforts to reach a contract still violates the Act if it unilaterally implements new terms of employment before exhausting the prospects of concluding an agreement." *Newcor Bay City Division*, 345 NLRB 1229, 1240 (2005). Further, in this case, such claims become far less supportable where there is a clear failure to timely provide presumptively or otherwise relevant information coupled with an unexplained failure and refusal to meet and bargain with the Union. Such violations of the Act go to the heart of the collective-bargaining process, and Respondent may not simply ignore them.

3. Contemporaneous Understanding of the Parties as to the State of Negotiations

I note that the Employer did not declare impasse at the time of the parties' final meeting on May 27, 2008. See *Huck Mfg. Co*. v. NLRB, 693 F.2d 1176, 1186 (5th Cir 1982); *Essex Valley Visiting Nurses Assn*., supra at 841. Moreover, Jasinski did not state that the Employer's economic offer presented on that occasion was its final offer. In fact, there was no indication on that occasion that bargaining would not continue.[55] I further note that nothing unexpected or out of the ordinary occurred between the final meeting and Respondent's declaration of impasse which would show that future negotiations would be futile or that a negotiated agreement could not be reached.[56]

---

positions regarding the applicability of the KL Agreement demonstrate bad faith. The KL Agreement expired in 1996 and has been superseded by any number of subsequent agreements. While I accept the argument advanced by the parties – that the absence of a current full agreement presented an obstacle to negotiations-- I also note that there is no evidence the parties were in disagreement about the terms and conditions of employment which were then applicable to Bristol Manor employees. Clearly, the issue provided yet another source of continued friction between the parties; however I do not find that the parties' maintenance of their respective positions regarding the applicability of the KL Agreement constitutes evidence of bad faith bargaining.

[55] Even if Respondent had, in fact, presented its proposal as a final offer, the Board has held that the assertion of a "final" position does not, by itself, require a finding of impasse. *Grinnell Fire Protection Systems*, 328 NLRB at 585 (citing inter alia, *PRC Recording Co*., 280 NLRB at 640). See also *Cotter & Co*., 331 NLRB at 791, where Member Brame quoted Judge Posner for the proposition that one party's proffering of a so-called final offer is not conclusive on the question of impasse because "[a]fter final offers come more offers." *Chicago Typographical Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7th Cir. 1991).

[56] In this regard, I fully credit Saint Hilare's testimony that Respondent was made aware of his unavailability in June 2008, and further note that this testimony is corroborated by Jasinski's

Continued

Here, the overall course and conduct of the parties does not evince a mutual understanding that further bargaining would not take place or be fruitful. As noted above, on June 17, 2008, Jasinski wrote to Saint Hilare: "We recognize that you are currently away on vacation . . . . We suggest you propose dates in July and August. . ." He thereafter asked for further bargaining dates on June 23. He also continued to send information to the Union. After receiving the final offer, Saint Hilare wrote to Jasinski and disputed his claims of Union inaction and impasse and stated the Union's desire to continue to meet and bargain.

The Union's course of conduct, on whole, demonstrates that it was willing to continue negotiations with Respondent. While both parties may have been frustrated with each other's bargaining positions and the pace of negotiations, such frustration is not the equivalent of a valid impasse, nor does it mean that a negotiated settlement is not within reach. *Grinnell Fire Systems*, 328 NLRB at 585, citing *Powell Electrical Mfg. Co*., 287 NLRB 969, 974-974 (1987), enfd. as modified 906 F.2d 1007 (5th Cir. 1990)(futility, not some lesser level of frustration, discouragement or apparent gamesmanship is necessary to show impasse.)

Based upon the foregoing, I conclude that the evidence is insufficient to meet Respondent's burden of proof that, at the time of the promulgation or implementation of the final offer the parties were of a contemporaneous mutual understanding that further bargaining would be futile. I further find that the objective evidence does not support Respondent's unilateral reliance on such an assumption.

4. Importance of the Issues Central to the Bargaining

As Respondent notes, there were various key issues that remained in dispute up to and through the final bargaining session. These include health insurance, wages, and minimums. Respondent argues that the Union remained fixed in its position on such issues and the resulting disputes created an impasse. *Richmond Electrical Services*, supra; *J.D.Lunsford Plumbing*, supra, In this regard, Respondent argues that the parties need not reach impasse on all issues before an employer may lawfully implement its bargaining proposal. *Calmat Co*., 331 NLRB 1084, 1097 (2000).

In disagreement with Respondent, and notwithstanding the fact that the parties had not reached agreement on several critical issues, I cannot conclude that the evidence establishes that the parties were at impasse at the time of the implementation of the final offer. The evidence fails to demonstrate the sort of deadlock which is characteristic of such a finding. The Union never told the Employer that it would be unwilling to make further concessions on any particular issue. Whether the parties could have eventually resolved their differences is unknown; however the evidence is clear that the Union was willing to continue bargaining and, prior to July 3, the Employer had committed to doing so as well. Under these circumstances, Respondent was required to "recognize that negotiating sessions might produce other or more extended concessions." *Royal Motor Sales*, 329 NLRB 760, 772 (1999), enfd. sub nom *Anderson Enterprises v. NLRB*, 2 Fed. Appx. 1 (D.C. Cir 2001).

Richmond Electrical Services, supra and *J.D. Lunsford Plumbing*, supra, cited by Respondent, may be distinguished in that the unions in those cases refused to accept any terms different from the standard, area contracts. In *Richmond,* the union conceded that the most-favored-nations clause precluded it from agreeing with the employer on wages lower than those

_____

own correspondence to the Union.

in the industry-wide agreement, and the Union never proposed lower wages. In addition, the impasse over wages there led to "a complete breakdown in negotiations." 348 NLRB at 1003. Similarly, in *J.D. Lunsford Plumbing*, supra at 1366, it was found that the union therein, "was simply unprepared to take anything less than it had obtained from the Association's members." Here, by contrast, there is no evidence that the Union insisted on the Tuchman Agreement or any other collective-bargaining agreement to the extent that it was unwilling to compromise further.

Similarly, *Calmat Co*., supra, is distinguishable insofar as it holds that impasse on a single critical issue may place such a hold on negotiations to render further bargaining meaningless. There, however, the union specifically told the employer that it would not make any further proposals unless and until the respondent "got off its . . . damn pension proposal." When the respondent's negotiator said that was not possible the union's negotiator acknowledged that the parties were "hung up on that" and the employer's representative concurred. 331 NLRB at 1099. Further, at one point prior to the communication of the respondent's final offer, the union told the employer that unless it took its pension proposal off the table there would be no movement on any other issue. In a letter communicating the final offer, the employer noted that the parties were at "irreconcilable odds." Such circumstances do not obtain here, where there is insufficient evidence to meet Respondent's burden to show that the parties had reached the sort of stalemate resulting in intractable positions on any issue or group of issues which would render further bargaining futile.

By contrast, the Board has no impasse to exist even when the evidence shows a "wide gap" in the parties' positions. See e.g. *Grinnell Fire Systems*, supra at 585-586 (no impasse where employer expressed unwillingness to move from its positions and the union had not offered specific concessions, but the union had declared its intention to be flexible and sought further bargaining); *Newcor Bay City Division*, 345 NLRB at 1239, (union's agent asked to continue bargaining, assured the employer that it was prepared to negotiate and it was expected that the union would make concessions based upon information provided by the employer); *Hayward Dodge*, 292 NLRB 434, 468 (1989)(notwithstanding a "wide gap" there was reason to believe that further bargaining might produce additional movement). Similarly, here, the evidence here shows that despite a "wide gap" on wages, minimums, health insurance and other issues, the Union officials were not at the end of their rope, but were willing to negotiate further.

d. Other Considerations

Moreover, the evidence establishes that Respondent's July 3 final offer differed in certain respects to its previous offers across the table. Under the no-frills proposal for the first time, Respondent proposed a two-tier no-frills system, and increased the number of allotted slots to 25 whereas it had previously proposed 20. In addition the no-frills rate would be paid above the minimum for each job classification, as opposed to an amount of $1.50 per hour over the employee's base rate, as had been proposed on October 24.[57] In this regard, the Board has held that introducing significant new proposals at a late stage of negotiations will undermine a contention that the parties have reached impasse. See e.g. *Hotel Roanoke*, 293 NLRB 182, 183 (1989). Here, in agreement with the General Counsel and the Union, I find that Respondent's late introduction of new proposals, which were related to issues which had been the subject of

[57] For the reasons discussed above, I do not agree with the General Counsel's contention that the final offer contained previously undisclosed language with regard to the Employer's obligation to make pension or training fund contributions.

significant discussion at prior bargaining sessions, and which had never been put forward prior to the announcement of the final offer, suggests that a valid impasse had not been reached.

D. The Alleged Unilateral Changes in Terms and Conditions of Employment

The general outline of the relevant law is well-settled. During negotiations for a collective-bargaining agreement an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). While such negotiations are ongoing, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991)(footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). Moreover, no impasse is possible where an employer presents the union with a "fait accompli" as to a matter over which bargaining to impasse is required. *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999) (citations omitted), enfd. granted in part and denied in part 233 F.3d 831 (4th Cir. 2000).

As discussed above, I have found that the parties had not reached impasse in bargaining. Moreover, the record establishes that Respondent has made unilateral changes in terms and conditions of employment. In particular, on or about July 13, 2008, Respondent implemented its final offer which increased employees' wages, established a two-tier no-frills system which also changed the rate of compensation for no-frills employees and increased the number of no-frills slots to 25, eliminated daily overtime pay, reduced health insurance benefits for employees working between 20 and 30 hours per week and partially implemented its proposal regarding a uniform allowance for certain employees. None of these changes had been agreed to in bargaining and, as discussed above, certain changes even differed from proposals Respondent had advanced during bargaining prior to the declaration of impasse.

All of the foregoing changes implicate wages, hours and other terms and conditions of employment and are, therefore, mandatory subjects of bargaining. See e.g. *Verizon New York, Inc.*, 339 NLRB 30, 31 (2003) (wages); *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 159 (1971)(pension and insurance benefits for active employees); *Mid Continent Concrete*, 336 NLRB 258, 259(2001)(health insurance benefits); *Keeler Die Cast*, 327 NLRB 585, 588-589 (1999)(wages, overtime, insurance coverage and vacation policies).

Accordingly, by making such changes in the absence of a valid impasse in bargaining and without the consent of the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

E. The Alleged Unilateral Discontinuance of Pension Fund Contributions

1. Contentions of the Parties

The complaint, as amended at the hearing, alleges that since on or about February 1, 2007, the Employer unilaterally refused and failed to make pension fund contributions without notifying or bargaining with the Union. This allegation is based upon an amended charge, filed on April 9, 2009, which amended an earlier charge filed in December 2007. At the hearing, Respondent answered the amended complaint, denying the material allegations and asserting certain affirmative defenses. In particular, Respondent argued that the allegations of the amended complaint were not supported by the evidence, were time-barred by Section 10(b) of the Act and did not relate back to the original charge as the amendment was predicated upon a

different legal theory from that set forth in the initial charge. In its post-hearing brief, Respondent further argues that the Union is without standing to raise the claim.

The General Counsel argues that the amendment is not time-barred because the allegations of the amended charge are "closely related" to the allegations of the earlier charge in Case No. 22-CA-28153 as they relate to mandatory subjects that were the subject of ongoing contract negotiations. General Counsel further contends that the Section 10(b) period did not start to run until February 9, 2009, when the Fund conducted an investigation into whether Healthcare and Sunshine had contracts with the Union. General Counsel maintains that the Union did not have either actual or constructive notice of the delinquencies prior to that time and that the Respondent has not met its burden of showing otherwise.

As noted above, Respondent argues that only the Fund, and not the Union, has standing to raise the allegations of the amended charge. In support of this contention, Respondent maintains that the Fund and the Union are separate and distinct entities and, moreover, that the Union does not represent the Fund. Respondent further argues that the evidence shows that since 2002 Bristol Manor has always made the required contribution to the Fund and it was the Fund that refused to process the checks it received from August 2003 through January 2007. The Fund then returned the checks and refunded amounts already paid and told the Employer that they would not accept further contributions without a signed collective-bargaining agreement. Subsequently, by letter dated April 1, 2009, the Fund reversed course and found that the Employer would be required to make contributions because it claimed it had subsequently received a signed collective-bargaining agreement. As Respondent argues: "As such, the Union's allegations that the Employer ***deliberately*** failed to make the necessary contributions to the Fund are utterly absurd. . ." (emphasis in original).

2. Analysis

a. The Union has Standing to File the Charge

With regards to Respondent's argument regarding the Union's asserted lack of standing, as an initial matter, I note that the Board administers public policy and its processes may be invoked by any person who believes such policies have been violated. This is reflected in Rule 102.9 of the Board's Rules and Regulations and Statements of Procedure which provides, inter alia, as follows:

> Who may file . . . a charge that any person has engaged in and/or is engaging in any unfair labor practice affecting commerce may be filed by any person . . .

Moreover, in *NLRB v. Indiana & Michigan Electric Company*, 318 U.S. 9, 17-18 (1943), the Supreme Court addressed the issue as follows:

> The Act requires a charge before the Board may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee. In the legislative hearings senator Wagner, sponsor of the bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board. He said it often was not prudent for the workman himself to make a complaint against his employer, and that strangers to the labor contract were therefore permitted to make the charge. The charge is not a proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading.

The Board has since adopted this ruling in *Bagley Products*, 208 NLRB 20, 21 (1973) and has also specifically affirmed that any person can file an unfair labor practice charge. See *Utility Workers Union of America (Ohio Power Co.)*, 203 NLRB 230 (1973).

b. The Section 10(b) Issue

Section 10(b) of the Act provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

I do not agree with the General Counsel's contention that the amendment is timely because it is "closely related" to the original timely-filed charge. The applicable principles are set forth in *Redd-I, Inc*., 290 NLRB 1115 (1988):

> First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

In this case, in agreement with Respondent, I find that the allegations of the amendment do not involve the same legal theory as that set forth in the original charge. While both allegations concern violations of Section 8(a)(5), they are otherwise dissimilar. The initial charge alleges a failure to provide information, the amendment alleges a unilateral change in terms and conditions of employment. Further, the factual predicates for the two allegations are not comparable and do not involve similar conduct during the same period. Nor is there a "causal nexus" between the allegations. See *SKC Electric, Inc*., 350 NLRB 857, 859 (2007). Moreover, it is apparent that the Respondent would not be raising similar defenses to these allegations. I conclude therefore, that the amendment to the charge in Case No. 22-CA-28153 is not timely under the principles enunciated in *Redd-I* and its progeny. See *Regency Grande Nursing & Rehabilitation Center*, 347 NLRB 1143, 1143-1144 (2006).

Nevertheless, for the following reasons, I find that the amendment to the charge is timely filed. The Section 10(b) limitations period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *See Vanguard Fire & Security Systems*, 345 NLRB 1016, 1016 (2005); *see also Allied Production Workers Local 12*, 337 NLRB 16, 18 (2001) (finding that the 6-month period provided by Section 10(b) begins to run only when a party has "clear and unequivocal notice" of the unfair labor practice). "A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence." *Ohio & Vicinity Reg'l Council of Carpenters*, 344 NLRB 366, 368 (2005) (citing *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001)) (applying Section 10(b) where a charging party was found to have been "on notice

of facts that reasonably engendered suspicion that an unfair labor practice had occurred."); see also *St. Barnabas Medical Center*, 343 N.L.R.B. 1125, 1127 (2004) (finding that knowledge is imputed when a party first has "knowledge of the facts necessary to support a ripe unfair labor practice."). If a party "'ha[s] the means of discovery [of a fact] in his power, he will be held to have known it[,]' and 'whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry might have led.'" *See Miramar Hotel Corp*., 336 NLRB 1203, 1252 (2001) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)); see also *Moeller Bros. Body Shop, Inc*., 306 NLRB 191 (1992) (holding that the "Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual noncompliance."); *Mathews-Carlsen Body Works*, 325 NLRB 661, 662 (1998) (finding that had the Union exercised reasonable diligence, the Union would have become aware that Respondent had not made fringe benefit payments on behalf of a majority of the employees); *but see R.R.R. Restaurant*, 314 NLRB 1267, 1268 (1994) (finding the Union had no knowledge of the repudiation of benefits where the employer consistently made late payments.). The burden of showing such clear and unequivocal notice is on the party raising Section 10(b) as an affirmative defense. *See Dedicated Services*., 352 NLRB 753, 759 (2008).

The Board has, in various circumstances, held that knowledge must be imputed directly to a union, and not to third parties, in order for the union to have constructive knowledge of an unfair labor practice. See *Dedicated Services*, supra (and cases cited therein). Moreover, in situations involving unions and benefit trust funds, it is well-settled that the law recognizes that labor organizations, and employers for that matter, are not presumed to be affiliated with multiemployer benefit funds, or to be anything but separate and distinct entities. *NLRB v. Amax Coal Co*., 453 U.S. 322 (1981); *Operating Engineers Local 12 (Griffith Co.)*, 243 NLRB 1121, 1125 (1979), affd. 660 F.2d 406, 411 (9th Cir. 1981). The activities of such a fund will be binding on a labor organization only upon a specific showing of agency responsibility. *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929, 931 (1984). Here, Respondent has adduced no such evidence and, to the contrary, has argued that these entities are unrelated. Overall, then, the Union, and not the Fund, must have had knowledge of the wrongdoing in order for the Section 10(b) period to begin.

That being said, I do not agree with the General Counsel and the Union that the Union was not in a position to know about the delinquencies in pension contributions prior to the February 2009 conference call. I find that the record here shows that the Union had sufficient facts at an earlier occasion to warrant the exercise of due diligence in this matter.

In particular, I find that this occurred in October 2008, when Blount wrote to Healthcare and Sunshine returning checks for a period from August 2003 through January 2007 and sent a copy of this letter to Union president Silva. In my view, the apparent failure of the employer to remit contributions after January 2007 was sufficient notice to trigger the Union's obligation to inquire as to why there were no contributions received after that date.[58] While it can be argued that there was no "clear and unequivocal" evidence of wrongdoing at this point, the Union was put on notice of facts that reasonably would have engendered suspicion that an unfair labor practice had occurred and a simple inquiry would have revealed that the employer had ceased making payments, as was the case after the Union and the Fund held their conference call. *Ohio & Vicinity Reg'l Council of Carpenters, supra; St. Barnabas Medical Center, supra; Mathews-Carlsen Body Works*, supra. I note that Respondent has failed to adduce evidence of any reporting requirement or any other basis for

[58] I additionally note that Blount specifically noted that most of the checks were more than six months old, yet another indication that timely payments were not being made. In addition, for the foregoing reasons, I do not credit Blount's testimony that the Fund was unaware that the Healthcare and Sunshine had ceased making contributions to the Fund until February 2009.

me to conclude that actual or constructive knowledge had or should have occurred on a prior occasion.

Respondent points to the November 2006 e-mail exchange between Union representative Alcoff and Fund collections manager Salm regarding the relationship between the Omni facilities and Healthcare and Sunshine. From these communications it is apparent that the Union was aware that the Fund had failed to deposit the remittances sent by Healthcare and Sunshine. From the evidence, however, it is also apparent that at that time Healthcare and Sunshine were continuing to make appropriate contributions. Thus, at the time these e-mails were exchanged there was no extant unfair labor practice. Moreover, there is no basis for me to impute to the Union constructive knowledge of any future failure to remit contributions to the Fund.

Accordingly, based upon the record evidence as adduced by the parties, and bearing in mind that it is incumbent upon Respondent to meet its burden of proof in asserting this affirmative defense, I find that it was not until October 10, 2008, that the Union had sufficient facts at its disposal to ascertain that the Employer had failed to make contributions for a significant component of the bargaining unit.

Inasmuch as, by that time, the 2002 MOA had expired, a timely charge had to be filed and served not more than six months after the Union received actual or constructive notice of the unfair labor practice. See *Chemung Contracting Corporation*, 291 NLRB 773 (1988); see also *Park Inn Home for Adults*, 293 NLRB 1082, 1083 (1989). Thus, here the Union was required to file and serve its charge no later than six months after October 10, 2008, the date on which it should have known of the Employer's alleged wrongdoing. See generally *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). (Section 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice.)

The Union filed its amended charge on April 9, 2009. The record demonstrates that it was sent to the Respondent and its counsel of record by the regional office on April 10, the following day. In accordance with Sec. 102.113 of the Board's Rules and Regulations, the date of service is the day on which the charge is deposited in the mail. See *Sioux Quality Packers*, 228 NLRB 1034, 1037 (1977); *Heartshare Human Services*, 339 NLRB 842, 847 (2003). Thus, the amendment to the charge was filed and served within the six month period after the Union received constructive notice of the unfair labor practice, albeit just barely.[59] Accordingly, I find that the Union's charge was filed and served in accordance with the provisions of Section 10(b) of the Act.[60]

As noted above, the amended charge alleges a failure to remit pension contributions dating from July 2007. The amended complaint, however, alleges that the failure to remit such contributions dates back to February 2007. Here, based upon the principles of *Redd-I*, supra, I find that the variance between the charge and the allegations of the complaint are not time-barred. The charge and the complaint involve the same theory of violation of the Act, sequence of events and defenses interposed by Respondent. In addition, the timing of the violation was a matter fully litigated at the hearing. See *Concourse Nursing Home*, supra at 694 fn. 13.

---

[59] See *MacDonald's Industrial Products*, 281 NLRB 577 (1986) (limitations period begins to run on the date after the alleged unfair labor practice occurs and does not include the day of the alleged unfair labor practice).

[60] Section 102.14 of the Board's Rules and Regulations provides that the charging party shall be responsible for the timely and proper service of the charge. However, the Board and the courts historically have held that service by the Board's regional office is sufficient, as long as it is timely. See *T.L.B. Plastics Corp.*, 266 NLRB 331, fn. 1 (1983) and cases cited therein.

c. The Unilateral Cessation of Pension Fund Contributions

Having found that the charge is timely filed and served and the allegations of the complaint are not barred by the applicable statute of limitations, I will now proceed to evaluate the evidence adduced in this matter. As noted above, Blount testified that the final checks from Healthcare and Sunshine were received in May 2007, and were remittances for the month of January 2007. This evidence, and Blount's testimony that no contributions were received thereafter, was unrebutted for the most part with the exception of the remittances sent in August 2009. There is no evidence that the Union was afforded notice or an opportunity to bargain over this issue at any relevant time.

Respondent further argues that it was the Fund that returned the remittance checks to Healthcare and Sunshine, and accordingly there is no evidence that the Employer deliberately failed to make contributions. Inasmuch as the Employer ceased sending contributions for periods after January 2007, which is well over one year prior to the return of any checks, the logic of this argument is unclear. While the Fund cannot be said to be blameless in these circumstances, applicable law makes clear that an employer's motive is not an element essential to a finding that a unilateral change is violative of Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962); *Gulf Coast Automotive Warehouse*, 256 NLRB 486, 488-489 (1981*); Merrill & Ring, Inc.*, 262 NLRB 362 (1982). Here, Respondent had a continuing obligation to make contributions to the Fund on behalf of its unit employees, notwithstanding any apparent failure on the part of the Fund to act with some measure of diligence in this matter. [61]

Accordingly, I find that Respondent has unlawfully ceased remitting pension contributions for bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act, as alleged in the complaint, as amended.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying in or failing and refusing to provide certain information requested by the Union in its letters of October 19, 2007 and February 14, 2008, which was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time licensed practical nurses, certified nurses aides, dietary and housekeeping and recreation employees employed by Respondent at its Rochelle Park, New Jersey facility.

[61] As noted above, it appears from the record that Healthcare and Sunshine have remitted contributions in August 2009. There is no evidence regarding what period of time such contributions may cover. In any event, this goes to the scope of any remedy to be sought in compliance proceedings in this matter rather than to the issue of whether an unlawful unilateral change had occurred in the first instance.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally cancelling bargaining sessions, thereby failing and refusing to meet and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described above.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by implementing its final offer and unilaterally changing terms and conditions of employees in the above-described unit without having reached agreement with the Union and in the absence of a valid bargaining impasse.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally ceasing to remit contributions to the SEIU National Industry Pension Fund.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall recommend that the Respondent supply the requested information, other than that which has already been provided to the Union. I further recommend that the Respondent be ordered to schedule negotiations and meet and bargain with the Union for a successor collective-bargaining agreement. I additionally recommend that Respondent be ordered to place into effect all terms and conditions of employment which were in existence on July 24, 2007 and to maintain those terms in effect until a new contract is concluded, the parties have bargained to a valid impasse or the Union has agreed to the changes. Provided, however, that nothing in this recommended Order is to be construed as requiring that Respondent cancel any unilateral changes that benefited the unit employees without a request from the Union. I also recommend that the Respondent be ordered to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of its final offer on or about July 11, 2008 or its unilateral discontinuance of contributions to the SEIU National Industry Pension Fund in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This includes reimbursing unit employees for any expenses resulting from Respondent's unlawful changes to their contractual benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons*, supra. I further recommend that the Respondent be ordered to make all contributions to any fund established by the collective-bargaining agreement with the Union which was in existence on July 24, 2007, and which contributions the Respondent would have made but for the unlawful unilateral changes, including all required contributions to the SEIU National Industry Pension Fund, including any additional amounts due to the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 6 (1979).[62]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[63]

---

[62] I leave for the compliance portion of these proceedings the appropriate computation of interest and additional sums due with respect to those Fund remittances which had been timely made by the Employer but not processed by the Fund.

[63] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.

Continued

ORDER

Respondent, Bristol Manor Health Care Center, Rochelle Park, New Jersey, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing to provide to the Union, or unnecessarily delaying in providing information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the Respondent's employees in the following unit:

All full-time and regular part-time licensed practical nurses, certified nurses aides, dietary and housekeeping employees and recreation employed by Respondent at its Rochelle Park, New Jersey facility.

(b) Failing and refusing to meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of the above-described unit by unilaterally cancelling bargaining sessions.

(c) Failing to adhere to the terms and conditions of employment that were in existence on July 24, 2007, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

(d) Implementing terms and conditions of employment that are different from those in existence on July 24, 2007, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to the changes.

(e) Failing and refusing to remit contributions owed to the SEIU National Industry Pension Fund.

(f) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union, in a timely and complete manner, the information requested in the Union's letters of October 19, 2007 and February 14, 2008, that has been found necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of employees in the above-described unit, to the extent such information has not been previously provided to the Union.

(b) Make a reasonable effort to secure any unavailable information requested in the Union's letters described above and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

(c) On request, meet and bargain with the Union for a successor collective-bargaining agreement at reasonable times in good faith until agreement is reached or a bona fide impasse

102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

is reached, and if an understanding is reached, incorporate such understanding in a written agreement.

(d) On request, restore, honor and continue the terms and conditions of employment which were in effect on July 24, 2007, in the manner set forth in the remedy section of this decision, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

(e) Make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful alteration or discontinuance of contractual benefits, with interest, as provided for in the remedy section of this decision.

(f) Make contributions, including any additional amounts due to any fund established by the collective-bargaining agreement that was in existence on July 24, 2007, and which Respondent would have paid but for its unlawful unilateral changes, as provided for in the remedy section of this decision.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Rochelle Park, New Jersey copies of the attached notice marked "Appendix."[64] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 2007.

[64] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 18, 2010.

_____
Mindy E. Landow
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail to provide to the Union, or unnecessarily delay in providing information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the employees in the following unit:

All full-time and regular part-time licensed practical nurses, certified nurses aides, recreation employees, dietary and housekeeping employees employed by Bristol Manor Health Care Center at its Rochelle Park, New Jersey facility.

WE WILL NOT fail and refuse to meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the above-described unit.

WE WILL NOT fail to comply with the terms and conditions of employment that were in existence on July 24, 2007, before a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

WE WILL NOT implement terms and conditions of employment that are different from those that were in existence on July 24, 2007, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to the changes.

WE WILL NOT fail and refuse to remit contributions owed to the SEIU National Industry Pension Fund.

WE WILL NOT In any like or related manner interfere with, restrain or coerce you in the exercises of the rights guaranteed you by Section 7 of the Act.

WE WILL schedule meetings and meet and bargain in good faith with the Union as the exclusive bargaining representative of our employees until a new contract is concluded or good-faith bargaining leads to an impasse.

WE WILL restore, honor and continue the terms and conditions of employment that were in effect as of July 24, 2007, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

WE WILL make employees and former employees whole for any and all loss of wages and other benefits incurred as a result of our unlawful alteration or discontinuance of contractual benefits, with interest.

WE WILL make contributions, including any additional amounts due, to any fund established by the collective-bargaining agreement that was in existence on July 24, 2007, and which we would have paid but for our unlawful unilateral changes.

BRISTOL MANOR HEALTH CARE CENTER

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.